

Montgomery County, Maryland Procurement Regulations

Executive Regulation 15-94AM as amended by Executive Regulation 30-97 dated December 9, 1997 and Executive Regulation 25-99 dated February 8, 2000

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1. COUNTY PROCUREMENT SYSTEM -- GENERAL

1.1 Authority

1.1.1 The County Executive and CAO are empowered to issue procurement regulations pursuant to Section 313, Montgomery County Charter and Chapter 11B, Montgomery County Code.

1.1.2 These regulations may be suspended or waived by the CAO with respect to any procurement action or class of procurement actions, including cooperative purchases, upon a determination and finding setting forth the reasons why the best interests of the County would be served by the waiver. The CRC must review each proposed suspension or waiver, and forward its recommendation to the CAO, prior to the CAO suspending or waiving the regulations. The CAO must identify each suspension or waiver, in writing, and send it to the Director and the County Council within 7 days after the suspension or waiver; the Director must maintain a record of the suspension or waiver notification from the CAO. If the CAO waives the monetary threshold for a formal solicitation to permit an informal solicitation, the Director must:

1.1.2.1 give public notice of the waiver;

1.1.2.2 ensure that the County invites at least 5 potential offerors that the Director knows or reasonably believes can provide the goods, services, or construction the County seeks to submit an offer. If there are fewer than 5 potential offerors, the County must invite each potential offeror to submit an offer;

1.1.2.3 give public notice that any potential offeror may submit an offer in response to the informal solicitation. The public notice must describe how the potential offeror may submit an offer; and

1.1.2.4 give public notice of the proposed contract awardee.

1.1.3 The CAO may adjust by increasing or decreasing the monetary thresholds established in these Regulations to reflect changes in the consumer price index for the Washington-Baltimore metropolitan area. The CAO must give public notice of any change in a monetary threshold. Public notice may be given through the Montgomery County Register. The Director may issue revised pages to the Regulations to reflect any modifications to these thresholds.

1.1.4 These regulations are issued pursuant to the requirements of law under Chapter 11B of the County Code.

1.2 Applicability

- 1.2.1 These regulations are applicable to all County departments and agencies and other public entities subject to the purchasing laws of the County, including the County Council, the County Board of Supervisors of Elections, the State Attorney's Office, the Sheriff's Office, the County Board of License Commissioners, and the Circuit Court (not including the Office of the Clerk of Court).
- 1.2.2. Where Montgomery County engages in a cooperative purchasing venture with or on behalf of another entity, these regulations may be applicable by agreement.
- 1.2.3 These regulations are not applicable to real property transactions, including land purchases, land dispositions, and leases.

1.3 Administration - Legal Review of Contracts

The Office of the County Attorney is responsible for the review of contract actions for legality and conformance with the Montgomery County procurement regulations to the extent that such review is deemed appropriate by the County Attorney.

1.4 Procurement Authority; Delegation of Authority

- 1.4.1 Authority to acquire goods, services, and construction is vested in the CAO and, by this regulation, is delegated, subject to revision by the CAO, to the Director. These contracting officers, and only these contracting officers, may delegate, or redelegate, in writing, this authority, subject to limits stated in the delegation. Contracts and orders may be executed on behalf of the County by these contracting officers only, except as otherwise provided in these regulations.
- 1.4.2 No contract or order may be entered into unless the contracting officer ensures that all requirements of procurement laws, Executive Orders, regulations, and all other applicable procedures have been met.
- 1.4.3 The CAO delegates, subject to revision by the CAO, all necessary authority to the CRC to carry out all responsibilities assigned that committee pursuant to law or these regulations.
- 1.4.4 Unless expressly prohibited by law, procurement authority may be delegated and subdelegated if the delegation is in writing. A delegation may be limited or made subject to conditions. Responsibility for a procurement action, however, may not be delegated.

1.5 Department Responsibilities

- 1.5.1 In general, Using Departments are responsible for compliance with the Montgomery County procurement regulations. Should individual or class deviations from specific requirements of these regulations be necessary, the Using Department must obtain approval before a procurement is effected pursuant to these regulations.
- 1.5.2 When any action occurs that is not consistent with Chapter 11B of the County Code or these regulations, the Using Department must forward available information as requested by the Director for appropriate investigation and remedial action.

1.6 Rules of Construction

- 1.6.1 Where there is a conflict between provisions of this regulation, the provisions of the more specific section control the provisions of the general section.
- 1.6.2 All contracts must be construed with the presumption that the contract complies fully with the provisions of these regulations and as if these regulations were incorporated into the contract.
- 1.6.3 Where these regulations conflict with provisions of a contract, County procurement procedures, directives, policies, or other matters pertaining to procurement, these regulations control. Otherwise, if a conflict can be resolved by interpretation, the provisions are to be interpreted in a way consistent with each other.

1.7 Appendices

- 1.7.1 These regulations may contain appendices which contain mandatory clauses. The appendices are not part of these regulations and may be updated from time to time by the Office of County Attorney.
- 1.7.2 The Director should be notified by the Office of County Attorney of any changes to the appendices. The Director is responsible for prompt distribution of amendments to the Using Departments.

1.8 Procurement Manual

The CAO may issue a Procurement Manual to provide internal guidelines to County employees and officials on the appropriate procedures and policies to follow in making a procurement. The manual is not part of these regulations. A violation of a guideline in the manual is not a basis for an offeror or contractor to challenge a procurement action by the County.

2. DEFINITIONS

2.1 The words defined in this section have the meaning set forth below whenever they appear, unless:

2.2.1 The context in which they are used clearly requires a different meaning; or

2.2.2 A different definition is prescribed for a particular section of the regulations.

2.2 The definitions for words contained in this section are construed as being consistent and supplementary to any definitions contained in Chapter 11B, Montgomery County Code.

2.3 These definitions contain substantive material. These defined terms must be interpreted where they appear in various sections of the regulations to include all the substantive provisions contained in the definition.

2.4 TERMS AND DEFINITIONS

2.4.1 **ACCEPTANCE OF GOODS OR SERVICES:** Acceptance constitutes a determination by an authorized government official that goods or services conforming to the requirements of a contract have been furnished by a contractor and that a contractor is entitled to payment under the contract. With respect to goods, acceptance is deemed to occur if, after a reasonable opportunity to inspect the goods, an effective rejection is not made within a commercially reasonable time.

Acceptance of goods may be revoked where: there is an acceptance on a reasonable assumption that a non-conformity would be cured and it is not later timely cured; or acceptance has taken place without discovery of a non-conformity where the acceptance was induced either by the difficulty of discovery before acceptance of the non-conformity or by the contractor's assurances with respect to conformity of the goods. Revocation of acceptance must occur within a reasonable time after the government official discovers or should have discovered the grounds for it.

2.4.2 **ACCEPTANCE OF OFFER:** A communication directed to an offeror by an authorized contracting officer in response to a specific offer. In order for this communication to become binding on the County, a fully executed contract must be delivered. The communication of acceptance of an offer must be made within the time specified for acceptance in the solicitation or authorized extension in order for the acceptance to be binding on the offeror; however, a communication of an acceptance of an offer made after the time specified in the solicitation may be accepted by an offeror.

- 2.4.3 **ADVANCE PAYMENT:** A payment to the contractor prior to receipt by the County of contractor performance that is at least equal in value to the amount of the payment.
- 2.4.4 **ASSIGNMENT:** The transfer of a contract right or obligation by a contractor to another party. A payment assignment is the assignment of a right to payment under a contract to a party designated by the contractor who has a right to that payment. A performance assignment is the assignment by a prime contractor to a third party of the obligation to perform a prime contract in accordance with its terms and conditions. Assignments must be made through a contract modification and specifically accepted and approved by the contracting officer in order to be effective. An assignment, unless it specifically provides otherwise, does not relieve the prime contractor of its obligations to the County.
- 2.4.5 **AUTHORIZED GOVERNMENT OFFICIAL:** A person granted specific authority to do a particular act by law, by delegation of authority, by official job description, by the law of agency or pursuant to contract provisions.
- 2.4.6 **AWARD:** The release of a fully executed contract to an offeror. This release may be accomplished by a contracting officer by depositing the contract in the mail, with a common carrier, delivering it to the offeror, or notifying the contractor by phone, telegram or other means which communicates acceptance of offer by the County.
- 2.4.7 **BID:** An offer to furnish goods, services, or construction in conformity with the specifications, delivery terms and conditions, and other requirements included in the invitation for bids; or, in the case of disposition of County property, an offer to purchase.
- 2.4.8 **BID BOND:** An insurance agreement in which a third party agrees to be liable to pay a certain amount of money in the event a bidder fails to sign a contract as bid or as mutually agreed upon presentation of that contract to the bidder.
- 2.4.9 **BID DEPOSIT:** A cashier's check, certified check, bank letter of credit, or bid bond, deposited with, and at the request of, the County, to guarantee that the bidder will, if selected, sign the contract as bid or mutually agreed upon presentation of that contract to the bidder. If the bidder does not sign the contract as bid or as mutually agreed, the deposit may be retained by the County.
- 2.4.10 **BIDDER:** See Offeror.
- 2.4.11 **BIDDER'S LIST:** A current file of vendors and other sources of supply for various categories of goods, services, or construction purchased for County use maintained by the Director.

- 2.4.12 **CAO:** The Chief Administrative Officer for Montgomery County.
- 2.4.13 **CERTIFICATION OF FUNDS:** A written or electronic certification by the Director of Finance that funds are available to pay the cost of a specific contract or the cost of the first term of a multi-term contract, as required by Chapter 11B, Montgomery County Code.
- 2.4.14 **CHANGE ORDER:** An order authorized by the contracting officer directing the contractor to make changes within the scope of the contract, pursuant to contract provisions for such changes, with or without the consent of the contractor.
- 2.4.15 **CLAIM:** A demand or request for payment for services or construction rendered or goods delivered, outside of an appropriately encumbered contract with the County, for which the contractor has a basis for payment, reimbursement, or compensation from the County under Chapter 11B, Montgomery County Code. See also related definition in Section 14.2.1.
- 2.4.16 **COMPETITION:** The process by which more than one valid source of supply for goods, services, or construction is solicited through the submission of offers which are to be evaluated in a comparative way for the purpose of selection of the source or sources most advantageous to the needs of the County.
- 2.4.17 **COMPETITIVE NEGOTIATION:** A process by which the County and one or more prospective suppliers communicate successive respective positions with respect to price, specifications, and other relevant terms and conditions in order to arrive at a contract for procurement of goods, services, or construction. Competitive negotiation may occur after required bidding or solicitation of proposals produces no award because of a deficiency in: proposed specifications, price, insufficiency of available funds, non-responsiveness, adequate competition, or responsibility factors. The Director must approve competitive negotiation before it can be used.
- 2.4.18 **CONFIDENTIAL INFORMATION:** Any information which is available to an employee only because of the employee's status as an employee of the County and is not a matter of public knowledge or available to the public on request. For purposes of this definition, an employee includes a volunteer.
- 2.4.19 **CONSTRUCTION:** The erection, alteration, repair, demolition or renovation (including dredging, excavating, landscaping and painting) of roads, public buildings, structures or other improvements to real property. Construction does not include routine maintenance, operation or repair of

existing facilities.

- 2.4.20 **CONTRACT:** Any type of documented agreement or order for the procurement or disposal of goods, services, construction or any other item which is binding on the contractor and the County. Unless specifically prohibited by Chapter 11B, contract types include: fixed-price, cost, cost-plus-a-fixed-fee, cost reimbursement or incentive; contracts may provide for the issuance of job orders, task orders, or task letters; contracts also include letter contracts, grants, purchase orders and contract modifications. All contracts must be in writing unless otherwise authorized by these regulations. A contract must include mandatory clauses.
- 2.4.21 **CONTRACT ADMINISTRATOR:** An authorized government official charged with responsibility for administering a contract with authority as provided in the contract document.
- 2.4.22 **CONTRACT AMENDMENT:** A modification to a contract signed by the contractor as well as the contracting officer which provides for a change of contract provisions, including additional work outside the scope of the original contract.
- 2.4.23 **CONTRACT MODIFICATION:** Any documented alteration in the specification, delivery, contract period, price, quantity, or other contract provisions of any existing contract, whether accomplished by unilateral action in accordance with a contract provision (change order), or by mutual action of the parties to the contract (contract amendment). It also includes administrative changes, notices of termination, field orders, and notices of exercise of a contract option and contract extensions. Unless expressly authorized by contract and these regulations, a contract modification must be written if the contract to be modified is written.
- 2.4.24 **CONTRACT REVIEW COMMITTEE (CRC):** A standing committee established for such purposes as specified in law or these regulations.
- 2.4.25 **CONTRACTING OFFICER:** The CAO, Director, others delegated by these officials to act within their authority, and other officials specifically authorized by these regulations to enter into a contract on behalf of the County. Only contracting officers may execute contracts or contract modifications on behalf of the County.
- 2.4.26 **CONTRACTOR:** Any individual or organization doing business with the County whether for services, construction or for the sale of goods or services pursuant to a contract.

- 2.4.27 **COOPERATIVE PURCHASING:** The combining of requirements of two or more public entities in order to obtain the benefits of volume purchases, reduction in administrative expenses, or some other public purpose.
- 2.4.28 **COST ANALYSIS:** The review and evaluation of the separate cost elements and proposed profit of an offeror's or contractor's cost or pricing data and an offeror's or contractor's assumptions and judgments in estimating costs from cost data.
- 2.4.29 **COST OR PRICING DATA:** All facts as of the time of price agreement that buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental, and are independently verifiable.
- 2.4.30 **COST REIMBURSEMENT CONTRACT:** A contract which provides for reimbursement of a contractor's costs associated with performance of specified contract requirements.
- 2.4.31 **COUNTY:** Montgomery County government.
- 2.4.32 **COUNTY DEPARTMENT, OFFICE, AND/OR AGENCY:** An officially designated unit of the County (including the County Council) subject to the procurement law and regulations of Montgomery County, including certain entities established by State law such as the County Board of Supervisors of Elections, the State Attorney's Office, the Sheriff's Office, the County Board of License Commissioners, and the Circuit Court (not including the office of Clerk of the Court).
- 2.4.33 **CRC:** The Contract Review Committee.
- 2.4.34 **DEBARMENT:** An exclusion for cause by the Director of firms or individuals from eligibility to participate in a procurement action.
- 2.4.35 **DELIVERY ORDER:** A document or other action which initiates a delivery of goods, services, or construction authorized by a contracting officer or authorized government official, under an existing contract which establishes terms, price and source of supply.
- 2.4.36 **DEPARTMENT:** See Using Department.
- 2.4.37 **DETERMINATION AND FINDING:** Documents prepared by an authorized government official which delineates the facts and reasons used for reaching a particular decision.

- 2.4.38 **DIRECT PURCHASE:** An informal procurement of goods, services, or construction which is accomplished under the direct authority of the Using Department Head and not by the Director. Competition should be preserved with this method to the extent practical. Contracting with MFD firms is encouraged.
- 2.4.39 **DIRECTOR:** Director of the Office of Procurement.
- 2.4.40 **DISPUTE:** A timely complaint filed by a contractor disagreeing with a decision made by an authorized government official regarding the contract.
- 2.4.41 **EMERGENCY:** Any dangerous condition or unforeseen curtailment, diminution or termination of an essential service which poses an immediate danger to health, life or property.
- 2.4.42 **EMERGENCY PROCUREMENT:** A procurement of goods, services or construction necessitated by any threatened dangerous condition or by a threatened imminent or unforeseen curtailment of an essential service or supply which, if not remedied by a procurement, will endanger or cause damage to health, life or property and which remedy cannot be accomplished through a timely procurement using normal procedures.
- 2.4.43 **ENCUMBRANCE:** The recorded reservation of appropriated funds to provide for payment of County contract obligations, which reduces remaining spending authority under an appropriation by that amount. A certification of funds constitutes sufficient evidence from the Department of Finance that there is a sufficient unencumbered balance in an appropriation to cover the amount of a specified contract, or the first term amount of a multi-term contract, as required by Chapter 11B, Montgomery County Code.
- 2.4.44 **EQUAL ("OR EQUAL"):** A phrase used to indicate permission to substitute products of similar or superior function, purpose, design, and/or performance characteristics. Substitutability is determined by conformance to salient characteristics.
- 2.4.45 **EVALUATION CRITERIA:** Criteria set forth in a solicitation document that specifies the basis for award of a contract.
- 2.4.46 **FIELD ORDER:** A limited and specific written order usually used in construction contract situations where the authority to direct timely limited change to contract work has been specifically delegated by the contract to the authorized government official at the place of performance.
- 2.4.47 **FIXED PRICE CONTRACT:** A contract which provides for a firm price under which a contractor bears the full responsibility for profit or loss.

- 2.4.48 **FORMAL SOLICITATIONS:** Invitation for Bids, Requests for Proposals and Requests for Expressions of Interest.
- 2.4.49 **GOODS:** Supplies, materials, equipment, and all other tangible commodities, except real property.
- 2.4.50 **GOVERNMENT:** Montgomery County Government.
- 2.4.51 **GRANT:** An action by a public or private entity which directs funds on a non-competitive basis to a specific entity. A grant must be implemented by a contract.
- 2.4.52 **INFORMAL SOLICITATION:** A procurement accomplished without an invitation for bids, request for proposal, or request for expressions of interest. An informal solicitation is not subject to formal public notice.
- 2.4.53 **INSPECTION:** Examination and testing of goods, services, and construction for materials, components, intermediate assemblies, and end items, to determine whether the goods, services, and construction conform to contract requirements. Inspection does not constitute acceptance.
- 2.4.54 **INVITATION FOR BID (IFB):** A formal solicitation in which competitive sealed bids are invited through a public notice procedure which requires that bids be received by a specified time and opened publicly. Invitations for Bids are evaluated solely in terms of bidder responsibility, bidder responsiveness, and price.
- 2.4.55 **LABOR AND MATERIAL BOND:** See Payment Bond.
- 2.4.56 **LATE OFFER:** An offer which is received at the place designated in the Invitation for Bids, Request for Proposals or Request for Expressions of Interest after the deadline established by the invitation or request. A late offer may not be accepted and must be automatically rejected.
- 2.4.57 **LIQUIDATED DAMAGES:** A sum agreed upon between the parties to a contract, to be paid as ascertained damages by the party who breaches the contract, and not as a penalty, where actual damages due to breach may be difficult to determine at the time of the breach.
- 2.4.58 **MFD:** An abbreviation used for minority, female, or disabled owned businesses as defined in Chapter 11B of the County Code.
- 2.4.59 **MANDATORY CLAUSES:** Clauses prepared by the Office of the County

Attorney which must be used in solicitations and contracts unless explicitly waived by the Office of County Attorney.

- 2.4.60 **MANDATORY IFB REQUIREMENTS:** Specific substantive requirements or specifications which may not be waived.
- 2.4.61 **MINI-CONTRACT:** A contract awarded through documented informal competition for professional services.
- 2.4.62 **MINOR INFORMALITY OR IRREGULARITY:** A requirement in a bid which is merely a matter of form (not substance) or is an immaterial or inconsequential provision in the solicitation. The Director may determine the defect or variation in the bid to be immaterial or inconsequential when the significance of the defect or variation as to price, quantity, quality, or delivery is trivial or negligible when contrasted with the total cost or scope of the procurement.
- 2.4.63 **MINORITY OWNED BUSINESS:** Any legal entity that engages in commercial transactions which is at least 51 percent owned, managed, and controlled by one or more minority persons and certain non-profit entities organized to promote the interests of persons with a disability, as defined in Chapter 11B of the County Code.
- 2.4.64 **MINORITY CONTRACTING:** Montgomery County contracting policies and procedures in accordance with the provisions of Chapter 11B of the County Code.
- 2.4.65 **MINORITY PERSON:** A member of a socially or economically disadvantaged group which includes African Americans, Hispanic Americans, Native Americans, Asian Americans, women, and persons with a disability as defined in Chapter 11B of the County Code.
- 2.4.66 **MISTAKE IN BID:** A claim by an offeror with respect to an IFB which asserts a mistake with respect to price or cost factors contained in the offer.
- 2.4.67 **MULTIPLE AWARD:** The award of separate contracts to two or more offerors for the same commodities or services in situations where the award of a single contract would be impractical or would not meet the total County requirements.
- 2.4.68 **NOTICE TO PROCEED:** A written notice to the contractor issued by an authorized government official directing commencement of contract performance.
- 2.4.69 **OFFER:** A timely response to a solicitation which is binding upon the

offeror during the period of time in which the offer is to remain open under the solicitation. An offer is not binding on the County until the award of a contract.

- 2.4.70 **OFFEROR:** A person or entity who makes an offer in response to a solicitation or makes an unsolicited offer.
- 2.4.71 **PAYMENT BOND:** A bond issued by a surety which guarantees payment of suppliers and subcontractors of a prime contractor.
- 2.4.72 **PERFORMANCE BOND:** A contract of guarantee submitted by a successful offeror to protect the County from loss due to the offeror's inability to perform or complete the contract as agreed.
- 2.4.73 **PRE-BID/PRE-PROPOSAL CONFERENCE:** An optional meeting held with prospective offerors prior to submittal of bids or proposals in response to a solicitation to discuss matters germane to the solicitation.
- 2.4.74 **PRICE ANALYSIS:** An analysis used to determine that a price submitted by an offeror is fair and reasonable. A price analysis must be made by the Using Department to support its recommendation for award.
- 2.4.75 **PROCUREMENT:** Buying, purchasing, or otherwise acquiring any goods, services, or construction. It also includes all functions that pertain to the obtaining of any goods, service, or construction, including description of requirements, selection and solicitation of sources, evaluation of offers, preparation and award of contract, dispute and claim resolution and all phases of contract administration.
- 2.4.76 **PROFESSIONAL SERVICES:** The services of attorneys, physicians, architects, engineers, consultants, and other recognized professional individuals, associations, corporations, and groups whose services are customarily negotiated because of the individuality of those services and level of expertise involved.
- 2.4.77 **PROPOSAL:** An offer binding on the offeror, in response to an RFP and a non-binding response to an REOI.
- 2.4.78 **PROPOSED AWARD:** A decision of the Director that a specific offeror is, after consideration of the recommendations (if any) of the Using Department, the successful offeror. This decision must be made in accordance with these regulations and initiates the process by which an award may be made to the offeror. A proposed award is not binding on the County.

- 2.4.79 **PROPOSER:** See Offeror.
- 2.4.80 **PROTEST:** A timely complaint by an offeror in connection with a perceived irregularity or impropriety with a solicitation process or responses received to a solicitation and administrative action with respect to the responses. A protest must be filed, in writing, with the Director.
- 2.4.81 **PUBLIC ENTITY:** A public entity is: (1) the federal, state and local governments or their agencies; (2) boards, commissions, or committees established by a federal, state, or local law; (3) government organizations or associations of the federal government, state governments, or political subdivisions of state governments; or (4) any other entity that both qualifies as a not-for-profit corporation under the provisions of the United States Internal Revenue Code and which is incorporated by one of the preceding entities for the exclusive purpose of supporting or benefiting a public entity. See Chapter 11B, Montgomery County Code.
- 2.4.82 **PUBLIC NOTICE:** Posting information on a bulletin board available for public inspection during regular business hours. Public notice may, as determined by the Director, also include other means reasonably calculated to notify the public and promote adequate competition such as advertisement, mailings, and placing notices in newsletters.
- 2.4.83 **QUALIFICATION AND SELECTION COMMITTEE (QSC):** A committee established by a Using Department for the purpose of evaluating responses submitted by offerors in connection with an RFP or an REOI. Each member of the QSC must be an employee of a public entity, unless specific authorization is obtained from the CAO for another to serve on the committee. The committee must be composed of at least three members.
- 2.4.84 **REQUEST FOR EXPRESSIONS OF INTEREST (REOI):** A solicitation to prospective offerors, the response to which is to be analyzed in accordance with selection criteria set forth in the solicitation. The REOI is used to develop a shortlist of prospective offerors who are eligible to receive a subsequent solicitation such as an RFP or an IFB. Requests for Expressions of Interest are generally made where specifications cannot be prepared or the availability of vendors for the goods, services, or construction involved is uncertain or unknown.
- 2.4.85 **REQUEST FOR PROPOSAL (RFP):** A solicitation to prospective offerors, the response to which is analyzed in accordance with selection criteria set forth in the solicitation for the purpose of ranking the proposals received. A Request For Proposal is generally utilized (instead of an REOI)

when specifications can be prepared.

- 2.4.86 **REQUIREMENTS CONTRACT:** A contract for goods, services, or construction covering long-term requirements (usually twelve months or more), used when the total quantity required cannot be definitely fixed, but may be stated as an estimate or within maximum and minimum limits. Delivery of goods, services, or construction are made upon issuance of a delivery order. A requirements contract may be exclusive, in which case all orders of goods, services, or construction covered by the contract must be made pursuant to it during its term. In the alternative, a requirements contract may be non-exclusive, in which case the contract should be used whenever possible, but is not the only source of goods, services, or construction covered by it. Unless a requirements contract, and the solicitation for it, states that it is an exclusive contract, it is a non-exclusive contract. A requirements contract may not be used to unduly restrict competition and may not normally be used for large construction contracts.
- 2.4.87 **RESPONSIBILITY:** A determination based on an offeror's reputation, past performance, business and financial capability and other factors that demonstrate the offeror is capable of satisfying the County's needs and requirements for a specific contract.
- 2.4.88 **RESPONSIVE OFFEROR:** An offeror who has submitted a bid which conforms in all material respects to the requirements of an IFB. The determination of whether a bid is responsive is made by the Director after appropriate consultation with the Office of County Attorney. The Director may solicit comments from the Using Department.
- 2.4.89 **RESPONSIVENESS:** A determination that a bid complies with the material requirements of an IFB. The Director determines if a bid is responsive. See Responsive Offeror.
- 2.4.90 **RETENTION (RETAINAGE):** The withholding of a part of the payment due to the contractor until the time of final acceptance according to the terms of the contract. The amount retained (also known as retainage), as well as the period of retention, is determined by the terms of the contract. Retention, as a method of payment administration, is usually associated with construction contracts.
- 2.4.91 **SALIENT CHARACTERISTICS:** Characteristics of a particular referenced good (product) or service necessary to meet the minimum valid needs of government as determined by the County.
- 2.4.92 **SCOPE (SCOPE OF CONTRACT):** The entire subject matter of a

contract in terms of goods to be delivered or services or construction to be performed under the contract. Scope includes all contract terms, conditions, and specifications. The scope of a contract determines whether an alteration to the contract work may be accomplished by change order or by contract amendment. Scope also includes "scope of services", if appropriate, which defines the work to be accomplished under the contract.

- 2.4.93 **SERVICES:** The performance of an identifiable task by furnishing labor, time or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance.
- 2.4.94 **SHORTLIST:** A limited number of offerors who, through a pre-qualification process, are qualified (usually through an REOI) to participate in a further evaluation and/or negotiation process for award of one or more contracts.
- 2.4.95 **SMALL PURCHASE:** An informal solicitation of goods, construction or non-professional services valued below a certain threshold.
- 2.4.96 **SOLE SOURCE:** A procurement in which goods, services, or construction necessary to meet minimum valid needs of the County are available from only one person or firm as provided in Chapter 11B of the County Code including those having the exclusive right to manufacture, sell or otherwise market certain goods or services.
- 2.4.97 **SOLICITATION:** A process for requesting submittal of offers through either a formal communication, which may include an IFB, RFP or REOI, or an informal communication, such as telephone communication and other forms of communication with potential offerors as specifically authorized under these regulations. A solicitation may only be issued by a contracting officer or an authorized government official.
- 2.4.98 **SPECIFICATION:** A concise statement of a set of requirements to be satisfied by the goods, services, or construction which the County wishes to acquire. A specification must indicate, whenever appropriate, the procedure by which requirements are determined to be satisfied. As far as practicable, it is desirable that the requirements be expressed in numerical or other objective terms, together with their ranges or limits. A specification may be a standard, a part of a standard, or independent of a standard. It may also be expressed as an end result. Specifications should be contained in solicitations as well as contracts. Specifications should not be overly restrictive or prejudicial to competition beyond that justified by minimum valid requirements of the County.

- 2.4.99 **STANDARDIZED PROCUREMENTS:** A standardized procurement is a purchase of equipment or parts for which the CAO determines standardization and interchangeability of parts is necessary or is in the public interest. A standardized procurement should include competition when reasonably available. Standardization approval must be for a stated period which bears a reasonable relationship to the life of the equipment and the specialized training or specialized equipment necessary to maintain the standardized item. A standardization decision includes the decision to procure compatible parts, equipment, maintenance and training.
- 2.4.100 **SUBCONTRACT:** An agreement entered into between a third party (known as a subcontractor) and a contractor who has a contract with the County (known as a prime contractor). Although the County is not a party to the subcontract, and the prime contractor is fully responsible for the subcontractor, the County may have certain control over the subcontract and subcontractor through the provisions of the prime contract.
- 2.4.101 **TERMINATION FOR CONVENIENCE:** A mandatory clause that provides for termination of all or part of a contract by a contracting officer if the contracting officer determines that termination is in the best interest of the County. Upon such termination, the Director may entertain contractors' claims for work accomplished or costs incurred up to the date of termination for convenience and process this claim in accordance with law and regulations.
- 2.4.102 **TERMINATION FOR DEFAULT:** A mandatory clause that provides for the cancellation in whole or in part of a contract, at the option of the County, because of the contractor's failure to perform. A termination for default may be accomplished by the Director in accordance with the terms of the contract after consultation with the Office of the County Attorney. A termination clause should provide for liability of the contractor for additional costs to the County in connection with procurement of substitute performance from replacement contractors. A termination for convenience may be added in the alternative to the notice of termination for default to provide that in the event that the termination for default is not sustained, the contract is terminated for convenience as of the date specified in the termination for default notice.
- 2.4.103 **TESTING:** A phase of inspection involving the determination by technical means of the physical and chemical properties of items, or components thereof, requiring not so much the element of personal judgment as the application of recognized and established scientific principles and procedures. This process is part of the determination of whether goods,

services, or construction should be accepted.

- 2.4.104 **UNSOLICITED PROPOSAL:** An offer from an offeror proposing to render services or construction or deliver goods to the County, outside of a solicitation by the County. Unsolicited proposals should be evaluated by an appropriate Using Department in terms of need, price, and funds available. If funds are available and need is present, the Using Department may initiate an appropriate solicitation as provided by these regulations, based upon the unsolicited proposal.
- 2.4.105 **USING DEPARTMENT:** Any County department, office or agency subject to the procurement requirements imposed under Chapter 11B, Montgomery County Code.
- 2.4.106 **WAIVER:** A variance from the requirements of the procurement regulations that is authorized by the CAO. A waiver may be granted for a single procurement or a class of procurements. A waiver may be granted only after a written determination and finding by the CAO.
- 2.4.107 **WARRANTY:** A representation that something is true, created either by express words or actions or implied either by the circumstances or commercial usages. It includes any affirmation of fact or promise made by a contractor or offeror which relates to goods, services, and construction and becomes part of the basis of the bargain. This may consist of a description of the goods made part of the contract which indicates an express warranty that the goods must conform to the description and samples or models; such a description creates an express warranty that the goods to be delivered must conform to the sample or model. When goods, services, or construction fail to conform to the terms of the express or implied warranty, a breach of warranty, and thus a breach of contract, exists for which the County has contractual remedies including termination for default.

3. ADMINISTRATIVE PROCESS -- PROCUREMENT

3.1 Contract Solicitations

3.1.1. A person working on a solicitation for the County must not release information concerning a solicitation to any person outside of the County until the solicitation is publicly issued. A person working on a solicitation, however, may obtain information from others for the purpose of determining the contents of the solicitation.

3.1.2 Formal Solicitation of Offers

3.1.2.1 Whenever the County engages in a solicitation process involving an IFB, RFP, or REOI, there must be public notice. The public notice should ordinarily include the solicitation document number, a description of the goods, services, or construction required, the name and telephone number of the person to be contacted for copies and/or information, the due date for submission of offers, any vendor requirements, and criteria for each award selection as may be appropriate. The Director determines how public notice is accomplished which may involve mailing to potential offerors.

3.1.2.2 The period of time from the date of public notice to the date a response is due is normally at least 30 days. Deviations from this normal period may be permitted if authorized by the Director.

3.1.2.3 Public notice concerning the solicitation should ordinarily be made available to offerors on the bidder's list and other offerors identified by the Using Department.

3.1.2.4 In providing public notice regarding solicitations, it is the policy of the County to be especially sensitive to the solicitation of MFD firms. Every effort should be exerted to identify and inform MFD firms of prospective County procurements. In this connection, the Using Department should give consideration to all MFD firms identified in the bidder's list.

3.1.2.5 Deviations and exceptions

(a) The Director may grant deviations to the above solicitation requirements. In authorizing the deviation, the Director must be satisfied that adequate competition is preserved to the extent possible.

(b) The public notice requirements as set forth above need not be followed

for emergency or noncompetitive procurements.

- 3.1.2.6 Failure to provide a solicitation document to a person or entity, even if the person or entity is named on the bidder's list or designated by the Using Department, does not affect the validity of the solicitation.

3.1.3 **Receipt, Custody, and Opening of Offers**

3.1.3.1 **Receipt**

- (a) All offers in response to formal solicitations must be timely received at the place designated in the solicitation document.
- (b) After receipt and identification of a timely response to a formal solicitation, the response should be immediately time-stamped and delivered to a custodian designated by the Director.
- (c) When an offer is received after the deadline for receipt, it should be immediately returned to the offeror.

3.1.3.2 **Custody of Offers**

- (a) The custodian of the solicitation responses must keep the offers in a safe and secure place, and must deliver the offers at the time and to the place of opening specified in the solicitation document. During the custodianship of the offers, the custodian must maintain exclusive control and custody, and must not permit any person access to or release any information concerning these documents unless specifically authorized by the Director.
- (b) An offeror may request to withdraw a response to a solicitation at any time prior to the time set for the receipt of the offer for purposes of either resubmittal or complete withdrawal. This request must be received before the deadline for receipt of offers, in writing and directed to the Director, who has discretionary authority to approve the request and direct the custodian to release the appropriate offer to the offeror.

3.1.3.3 **Opening of IFB's; Release of Information**

- (a) Responses to IFB's must be opened on the date and time and at the place indicated in the solicitation documents, unless the Director determines that circumstances require a different date, time or place

for opening.

- (b) The person designated to open bids by the Director decides when the time set for opening bids has arrived and informs those present of that decision. That person then: (1) personally and publicly opens all bids received as of that time, (2) at his/her option, reads the bids aloud to the persons present, and (3) leaves a copy of the bid document in the bid room for review by interested persons for a reasonable period of time or makes arrangements for the furnishing of copies of these documents to interested persons.
- (c) No statement or comment made by the person opening the bids is binding on the County or has any effect with respect to interpretation of the solicitation documents or responses received. This person is only authorized to perform a ministerial function in opening the bids as part of a public process.

3.1.3.4 Opening of RFPs and REOIs; Release of Information

- (a) Responses to RFPs and REOIs are not publicly opened at the time they are due as specified in the solicitation documents. After the date and time responses to these solicitations are due, the offers are opened, not publicly, under the direction of the Director. Thereafter, they are sent to the responsible Using Department which must evaluate those responses timely received and arrive at a ranking pursuant to the solicitation document. The envelope in which a response to an RFP or REOI was received should be kept with the response by the Using Department until a final award is made and all appeals, if any, are resolved.
- (b) Until a proposed award for an RFP is posted, or a shortlist for an REOI is posted, all responses to RFPs and REOIs are confidential information and must not be released to the public.
- (c) Offers and evaluations of offers, including QSC scoring, are available for public inspection after a proposed award has been posted, in the case of an RFP, or after a shortlist has been posted, in the case of an REOI. Confidential commercial information and other information not subject to disclosure, as determined by the County Attorney, must not be publicly disclosed at any time. The County may require an offeror to designate which information is not subject to disclosure. As a condition of keeping the information confidential, the County may require an offeror to agree to defend and hold the County harmless if the information is not released at the request of the offeror.

Information not expressly identified as confidential by the offeror may be released by the County.

3.1.3.5 Late Offers

Responses to IFB's, RFP's or REOI's received after the date and time specified in a solicitation are considered late and may not, under any circumstances, be considered for any award resulting from the solicitation.

3.1.4 Solicitation Cancellation

3.1.4.1 Before Time for Opening

The Director may cancel solicitations in whole or in part before their opening or due date when it is determined that this action is in the best interest of the County. This decision should be made only after consultation with the affected Using Department.

3.1.4.2 After Time for Opening

The Director may cancel a solicitation in whole or in part after the date specified for opening. The decision to terminate the solicitation may be based upon the following list of factors, among others:

- (a) All offers are non-responsive;
- (b) All offers are so excessively low or high as to indicate a defective statement of specifications that requires correction and reissuance of the solicitation;
- (c) Specification deficiencies are discovered;
- (d) None of the offers meet the County's requirements in terms of price or funds available;
- (e) Responses received indicate a problem in dissemination or communication of the solicitation (e.g. insufficient number received under the circumstances or inappropriate responses indicating misunderstanding of solicitation language);
- (f) Procurement requirements have changed;
- (g) No offers are received;

- (h) Other circumstances which indicate a failure of the solicitation process to promote full and fair competition. In making this decision to cancel a solicitation, the Director should consult with the affected Using Department.

3.1.4.3 Notice to Offerors

The Director should communicate cancellation of a solicitation by a method determined in the Director's sole discretion to give appropriate notice to offerors of the cancellation in the earliest possible manner. Usually notice of cancellation should be posted in the same manner as posting a proposed awardee. Offerors are not entitled to any compensation in connection with cancellation of a solicitation.

3.1.4.4 Cancellation Final

The decision to cancel a solicitation is final and is not subject to review.

3.2 Contract Awards

- 3.2.1 Upon receipt of evaluated offers and recommendations for proposed award from the Using Department, the Director may independently review and evaluate the solicitation responses. After consideration of the evaluation and recommendation of the Using Department, the Director makes a proposed award to a specific offeror. The Using Department should be notified when proposed awards are publicly posted. Until a proposed award is posted by the Director, all information concerning the evaluation and recommendations is confidential.
- 3.2.2 Upon determination of a proposed contract awardee for a formal solicitation, the Director must place the number of the contract and the name of the proposed contract awardee on a public list. The list must be available for inspection by any offeror. The date of each proposed award decision must also be indicated on the list. This list applies to formal solicitations which include responses to IFBs, RFPs, and REOIs. It is the responsibility of offerors to keep informed of the current status of any proposed award. Placement of a proposed awardee on the public list constitutes notice to all offerors of the proposed awards. The Director may make such other communications with respect to proposed awards as deemed appropriate, in the Director's sole discretion, given the particular circumstances of a solicitation.
- 3.2.3 After the posting of a proposed award, the Director initiates the process which leads to the execution of a contract for the solicited services, goods, or construction. After all necessary approvals and clearances have been obtained, the

contracting officer may execute the contract with a signature on behalf of the County. The intentional release of the fully executed contract constitutes an award.

3.3 Contract Documents

A written contract document is required in connection with all procurements of goods, services, or construction in Montgomery County with the exception of direct purchases, Using Department reimbursable purchases, credit card purchases and emergency procurements.

3.3.1 County Attorney Approval

3.3.1.1 All contracts, with the exception of small purchases and delivery orders against existing contracts, must be submitted to the Office of County Attorney for review and approval for form and legality. Ordinarily, the contract should be submitted to the Office of County Attorney after signature recommending it by the Using Department Head and before signature by the prospective contractor and the contracting officer. The Office of County Attorney may authorize exceptions for certain classes of contracts or give advance approval of specific contracts or classes of contracts which do not require review and approval for form and legality by the Office of County Attorney; this authorization must be in writing with a copy forwarded to the Director.

3.3.1.2 The Office of County Attorney may approve, approve with conditions, or reject any contract submitted. If approved with conditions, all conditions must be satisfied prior to submittal to the contracting officer for signature.

3.3.2 Signatures

3.3.2.1 All contracts except those determined by the Director must contain the signature of the offeror and the signature of the contracting officer. The signature of the head of the Using Department should also be included, recommending approval of the contract.

3.3.2.2 Signatures of offerors and contractors must be in their correct legal form and must not be abbreviated to common usage or trade name form. All corporation signatures must either contain the seal of the corporation or the attestation of a separate corporate officer (usually the corporate secretary) of the authority of the corporate officer who signs the contract to bind the corporation for the particular contract

at issue. For partnerships, there must be a signature by at least one general partner. Contracts that are not signed in compliance with these requirements are voidable at the option of the County.

- 3.3.2.3 Prior to the execution of the contract by the contracting officer, sufficient documentation of an encumbrance to cover the appropriate contract amount must be submitted to the contracting officer. Contracts may contain "subject to appropriation" conditions which authorize the contracting officer to execute the contract without encumbrance documentation, if approved by the Office of County Attorney. The contracting officer must approve any reduction in an encumbrance after a contract is executed.
- 3.3.2.4 A Notice to Proceed under a contract must not be issued until the contract is awarded.
- 3.3.2.5 Original contract signatures must be in ink, unless otherwise authorized by the Office of the County Attorney. When volume of signatures is a consideration, a facsimile signature stamp may be authorized by the person whose signature is represented by the facsimile. Facsimile stamps may be used only under conditions authorized by the Director.

3.3.3 Copies

- 3.3.3.1 There should be three originals, two of which may be reproductions of contracts which are subject to original signatures or facsimile stamps, or a combination of both.
- 3.3.3.2 When specifically authorized by the Director, there may be fewer than three original contracts subject to original signatures (e.g. purchase orders).
- 3.3.3.3 Additional copies may be made of the signed originals and these should be marked clearly "COPY" at the top of the front page.

3.4 Records Retention

- 3.4.1 The Director is the official custodian of all contract records and files. Under the Director's supervision and at the Director's direction, contract files must be retained by Departments which have responsibility for their original compilation for such period of time and under such conditions as determined by the Director.
- 3.4.2 All contract files must be maintained for a minimum of 5 years after the latest date

of completion of a contract or date of final payment whichever is later.

- 3.4.3 The Director may develop and issue minimum standard formats and procedures for procurement and contract administration files.

4. SOURCE SELECTION METHODS AND CONTRACT TYPES

4.1 Description of Source Selection Methods

4.1.1 Formal Solicitations -- Invitation for Bid (IFB)

4.1.1.1 General

An IFB is a formal solicitation by which competitive sealed bids are invited through a public notice procedure which results in an award to the lowest responsible, responsive bidder.

4.1.1.2 Use

IFBs are normally used when the procurement is for construction, goods, or non-professional services. An IFB is used for procurements valued at \$25,000 or more, with informal procurement procedures being utilized for under \$25,000 procurements. An IFB may be used for professional services if the Director determines that:

- (a) Specifications are defined in sufficient detail to allow a contract award without further need to clarify the scope of work; and
- (b) The ability of the offeror may be established through criteria such as years of experience, licenses held, degrees awarded, or other objectively measurable criteria.

4.1.1.3 Contents

An IFB should include the following information:

- (a) Instructions to Bidders in a form authorized by the Director.
- (b) A notice of the time and place for submission of the bids and for the bid opening, and a statement of the number of copies required to be submitted.
- (c) The date and place where the pre-bid conference, if any, will be held.
- (d) The identity, address, and telephone number of a contact person within the Using Department for technical information pertaining to the solicitation. The identity and telephone number of a contact person in the Office of Procurement for administrative information relating to the solicitation.

- (e) A description and/or specification including any plans or designs for the construction, goods, or services which are to be procured, with sufficient specificity and detail to permit full and free competition and direct incorporation into a contract document without need for further change or amendment.
- (f) A concise explanation of the method of the award, e.g., whether the award is based on the lowest bid price, the lowest evaluated bid price, or some other cost or price criteria, whichever is applicable. If an evaluated bid price is used, the objective measurable criteria to be used must be set forth in the IFB. These criteria may include:
 - (1) length of the usable life of the particular goods as compared to competitive goods;
 - (2) the degree and quality of services;
 - (3) the environmental impact of the goods and services being offered;
 - (4) the resale value of the goods; and
 - (5) the operating costs associated with the goods such as:
 - (A) availability, cost, quality, and delivery of parts
 - (B) availability and cost of service; and
 - (C) cost of maintaining a spare parts inventory.

In addition, where alternates are solicited, the IFB must specify whether alternates will be considered in the evaluation of the bid and, if so, must indicate the basis for utilization of alternates in arriving at a determination of the lowest bid price or the lowest evaluated bid price.

- (g) A listing of all required submissions and due dates by the offeror including samples, descriptive literature, and all other submissions which, if missing from the solicitation response, are grounds for disqualification as being non-responsive.
- (h) All required contract clauses, which clauses include an audit clause,

contingent fee prohibitions, restriction on hiring County employees, non-discrimination in employment, dispute clause, termination for convenience clause, default clause, assignment clause, change order clause, and all other mandatory clauses. See Appendix or the County Attorney for mandatory clauses.

- (i) Optional provisions applicable to the particular procurement involved, as appropriate.
- (j) A statement of the MFD requirements, if applicable, as authorized by the Director.
- (k) A statement of insurance and bond requirements, if applicable.
- (l) A provision which requires acknowledgement of all amendments or addenda by offerors.
- (m) Information pertaining to delivery and performance under the contract.
- (n) An identification of the administrators of the contract, a statement of requirements for inspection and acceptance by the Using Department and a delineation of authorities and responsibilities of the Using Department with respect to the contract (i.e. authority to recommend payment of invoices, non-authority to amend the contract, etc.).
- (o) A statement that the bid may be accepted within 120 days (or such other time as approved by the Director) from the date of opening of the IFB.
- (p) On a separate form or at the beginning or end of an IFB, all IFBs must provide appropriate spaces for:
 - (1) All bid prices which must be the basis for the award; and
 - (2) Signature by a person authorized to bind the offeror to the bid, indicating agreement with all provisions of the IFB. The page on which these spaces appear must be identified in such a manner as to integrate it with the rest of the bid document.

4.1.1.4 **Procedure**

- (a) IFBs are issued and public notice given under the direction of the Director.

- (b) Responses to the IFB are received by the Director, as specified in the solicitation, time-stamped, and publicly opened.
- (c) Bids are tabulated and forwarded to the Using Department for evaluation when deemed appropriate by the Director or when specifically requested by the Using Department Head.
- (d) When appropriate, the Using Department evaluates the bids in accordance with the method of award criteria, and for responsiveness and responsibility, and forwards recommendations to the Director. These recommendations must include an evaluation regarding the reasonableness of the proposed award prices. If retained by the Director, the Director evaluates the bids in accordance with the method of award criteria, and for responsiveness and responsibility.
- (e) In the case of tie bids, the Director resolves a tie by application of the following in the order stated:
 - (1) Making a proposed award of the contract to the bidder who has its principal place of business in Montgomery County;
 - (2) Making a proposed award of the contract to the bidder who is an MFD business;
 - (3) Drawing of lots with representatives of the firms involved invited to be present.
- (f) The Director reviews the recommendations of the Using Department and, if necessary, conducts an independent review of the bid responses, and makes a proposed award decision.
- (g) The name of the proposed contract awardee or notice of IFB cancellation is placed on a public list by the Director.
- (h) The Director receives the executed contract from the bidder and reviews the signature of the bidder for conformance to the signature form requirements of the Office of County Attorney.
- (i) The Director ensures the encumbrance of required funds, as appropriate, and executes the contract on behalf of the County. The Director provides for distribution of copies of the contract to the Using Department and the bidder.

4.1.2 Formal Solicitation -- Request for Proposals (RFP)

4.1.2.1 General

An RFP is a formal solicitation for competitive sealed proposals. Proposals are not publicly opened. An RFP is a procurement process in which quality and price are balanced to meet the needs of the County. Final costs and scope of work are subject to negotiation after the proposals are received and before the contract is awarded unless otherwise stated in the RFP.

4.1.2.2 Use

- (a) RFP's are used for procurement of professional services or of a system which consists of professional services as well as construction, goods or non-professional services.
- (b) RFP's are utilized when (1) a Department can generally formulate the specifications for the services or system to be acquired; (2) there are known sources of supply and competition is anticipated; and (3) the procurement is valued at \$25,000 or more.
- (c) RFP's are used when technical considerations as well as cost are valid criteria in the evaluation of offers.
- (d) An RFP may also be used for the procurement of construction, goods, or nonprofessional services when the County judges that the use of evaluation criteria authorized for use in an RFP would promote the best interests of the Government. Approval to use an RFP instead of an IFB for the procurement of construction, goods, or nonprofessional services must be approved by the Director.

4.1.2.3 Contents

An RFP should include the following information:

- (a) A dated solicitation transmittal letter for signature by the Director that summarizes the central RFP requirements. This letter should be in a form and contain such information as is required by the Director.
- (b) A notice of the date, time and place for submission of proposals and a statement of the number of copies required to be submitted.
- (c) The date and place where a pre-proposal conference, if any, would be

held.

- (d) The identity, address, and telephone number of a contact person within the Using Department for technical information pertaining to the procurement. The identity and telephone number of a contact person within the Office of Procurement for administrative information relating to the solicitation.
- (e) A brief description of the project and scope of services. The scope of services should be described with sufficient specificity and detail to permit full and free competition and direct insertion into a contract document without need for further change or amendment to the scope of services.
- (f) A concise explanation of the method of award, which must include identification of all criteria and relative weights for each criterion.
 - (1) The Using Department, however, may choose not to publish relative weights for each criterion, in which case the Using Department must indicate to the Director its decision to maintain the weights as confidential until after award and, on a separate document, forward the relative weights to the Director. If oral interviews are contemplated, the objective criteria for determining when, how many, and which proposers are eligible for the interview stage must be specified.
 - (2) An explanation of point scoring for screening and interview steps must also be included (e.g. an explanation of the relationship between written submissions and oral interview evaluations).
 - (3) The Using Department must develop for use by the QSC scoring guidelines for each criterion. These guidelines are confidential until a proposed award is posted.
 - (4) The RFP may contain a minimum score which establishes a threshold that an offeror must achieve in order to be considered for an award under the RFP.
 - (5) Evaluation criteria may include:
 - (A) General experience and technical competence.
 - (B) Past performance record on other county projects.

- (C) Related experience on similar projects.
 - (D) Compatibility of size of firm with size of proposed project.
 - (E) Knowledge of local conditions, codes and ordinances where such knowledge is essential to the proper performance of the contract.
 - (F) Current total workload of the contractor and the capacity to accomplish the proposed work in the required time.
 - (G) Special familiarity with project or project site.
 - (H) Special qualifications, experience, design approach, etc.
 - (I) Originality and design quality of previous work.
 - (J) Adequacy of office facilities where services will be rendered.
 - (K) Involvement of consultant's management and participation of key officials in the project.
- (6) Evaluation criteria must include appropriate cost factors. Points assigned to the cost criterion must be contained in the decisive selection step (e.g. final interview stage or last screening step when no interviews are held). The cost criterion may be contained in earlier steps in the selection and evaluation process, if the points in that earlier step are part of the final total point score.

At least 10 percent of the total points for all evaluation criteria must be assigned to the cost factor. Ten percent is a minimum value and may only be used with the approval of the Director; Using Departments should use, in appropriate procurement situations, a cost selection factor greater than ten percent.

An RFP may provide for a selection process which requires each offeror who exceeds a pre-established score to compete for designation as the top-ranked offeror on the basis of price alone. A price submission under this process must be submitted

in a sealed offer. If required in the RFP, the price offer must be binding on the offeror. The RFP may require that the price offer be submitted at any point during the evaluation process.

Hourly rates for personnel, cost data, and proposed costs must include all multipliers and overhead charges (e.g., General and Administrative overhead, profit, etc.).

- (7) As an alternative to including a cost criterion, a Using Department may utilize a pre-planned cost negotiation process if authorized by the Director.

The pre-planned cost negotiation process allows the Using Department to negotiate with the top ranked offeror under a process which ensures a fair and reasonable cost for the contract. This process includes a written analysis, supported by appropriate documentation, of reasonable cost or ranges of cost for each category of goods or services and an estimated value of the entire contract work. This analysis must be provided to the Director by the Using Department prior to opening of the proposals. The Using Department negotiates the price of the contract with the top-ranked offeror; the price should fall within the amount estimated in the Using Department's analysis.

- (8) References must not be used as an evaluation criterion.

- (g) All required contract clauses, which clauses include an audit clause, contingent fee prohibitions, restriction on hiring county employees, non-discrimination in employment, dispute clause, termination for convenience clause, default clause, assignment clause, change order clause, and all other mandatory clauses.
- (h) Optional provisions applicable to the particular procurement involved, as appropriate.
- (i) A statement of the MFD requirements, if applicable.
- (j) A statement of insurance and bond requirements, if applicable.
- (k) A provision which requires acknowledgement of all amendments or addenda by offerors.
- (l) Information pertaining to delivery and performance under the contract.

- (m) An identification of the administrators of the contract, a statement as to requirements for inspection and acceptance by the Using Department, and a delineation of authorities and responsibilities of the Using Department with respect to the contract (i.e., authority to recommend payment of invoices, authority to review the work and approve it, non-authority to amend the contract, etc.).
- (n) A statement that the proposal may be accepted within 120 days or another time as approved by the Director from the date established for receipt of offers.
- (o) On a separate form or at the beginning or end of the RFP, the Using Department must provide a specific place for signature by the person authorized to bind the proposer to the proposal, indicating agreement with all terms and conditions of the proposal. The page on which this signature appears must be identified in a manner that integrates it with the solicitation.

4.1.2.4 **Procedure**

- (a) RFPs are issued and public notice given under the direction of the Director.
- (b) Timely proposals are received by the Director and forwarded to the Using Department for evaluation, without public opening.
- (c) The QSC evaluates all proposals received from the Director, in accordance with the evaluation criteria, and reviews offerors for responsibility.
 - (1) The chair of the QSC is responsible for assuring that the proper evaluation procedures are followed by the QSC. Questions regarding specific procedural issues should be referred by the chair to the Director.
 - (2) Each member of the QSC must exercise independent and impartial judgment in evaluating a proposal. A QSC must follow the following procedures:
 - (3) The evaluation must be based solely on the material presented to the entire QSC pursuant to the submission requirements of the RFP. Accordingly, each member of the QSC must be present during such evaluation procedures as site visits, demonstrations, and interviews.

- (4) Each member of the QSC must participate and vote in the evaluation and score each proposal. No alternates are allowed nor may a non-QSC member participate in the evaluation. Substitution of a member may be allowed only upon a written request from the Head of the Using Department and the express approval of the Director. If the scoring process has begun, the Director must decide if the scores of the member replaced must be adopted by the new member or if the new member or the entire QSC should begin the scoring process anew.
- (5) A member of the QSC may not participate in the evaluation and selection process if that member cannot render an independent and impartial judgment because of a relationship with an offeror. Each member of the QSC must certify in writing that:
 - (A) the member has used independent and impartial judgment as a member of the QSC;
 - (B) that the member has complied with the requirements of:
 - (i) Section 19A-11, Montgomery County Code, which prohibits participation in matters where there is a conflict of interest;
 - (ii) Sections 19A-12 and 11B-52, Montgomery County Code, which prohibit employment relationships between a County employee and an offeror;
 - (iii) Section 19A-15, Montgomery County Code, which prohibits the disclosure of confidential information;
 - (iv) Sections 19A-16 and 11B-51, Montgomery County Code, which prohibit the solicitation or acceptance of gifts from offerors; and
 - (C) no relative or member of the QSC's household (as both terms are defined in the Montgomery County Public Ethics Law) will be affected by any contract awarded under the solicitation.
- (6) The formal meetings of a QSC during which proposals are evaluated are closed to non-QSC members.

- (7) Prior to formal meetings of a QSC, QSC members may meet with other County staff for guidance as to procedures, standards, and technical information relative to the solicitation, but not regarding the content of specific proposals. QSC members may not meet with persons other than County staff regarding a solicitation without the specific concurrence of the Director.
- (d) The QSC forwards its ranking of offerors and recommendations regarding responsibility of prospective awardees to the Using Department Head. The Using Department Head (and others as appropriate) reviews and forwards the QSC recommendations with concurrence, objection, or amendment to the Director. The Using Department Head may also recommend termination of the procurement. This set of recommendations must be accompanied by QSC conflict of interest certifications, individual QSC member score sheets of all proposals evaluated and a summary score sheet containing results of individual QSC member's scores, supporting the recommendations.
- (e) In the case of a numerical score tie, the Director resolves the tie by application of the following in the order stated:
 - (1) Making a proposed award of the contract to the offeror who has its principal place of business in Montgomery County;
 - (2) Making a proposed award of the contract to the offeror who is an MFD business;
 - (3) Drawing of lots with representatives of the firms involved invited to be present.
- (f) The Director approves, approves with conditions, or rejects the recommendations and supporting documentation. If the Director agrees with the QSC recommendation and the recommendation of the Using Department Head, the Director may proceed immediately to place the recommended offerors on a public list and commence the contract execution process. If the Director approves with conditions, the Using Department must satisfy the conditions and provide appropriate documentation of compliance to the Director, prior to commencing contract negotiations. If the Director rejects a recommendation for award, the RFP package is returned to the Using Department head for further action as indicated by the Director.

- (g) After selection of the proposed offeror and required approval, the Director places the names of each proposed awardee on a public list. In the event of cancellation, notice of cancellation of the RFP is placed on a public listing by the Director.
- (h) After Director approval, the Director or the Using Department negotiates the contract with each approved top-ranked offeror. The Using Department is responsible for coordination of MFD compliance review with the Director. Negotiations must include a "not to exceed" price. If a contract cannot be successfully negotiated for a fair and reasonable price with the top-ranked offeror, the Using Department proceeds to negotiate with the next highest ranked offeror after obtaining approval from the Director. If the Director approves, the Using Department may negotiate simultaneously with more than one offeror.
- (i) The Director receives the contract from the Using Department, ensures the encumbrance of required funds, as appropriate, and executes the contract on behalf of the County. The Director provides for distribution of copies of the contract to the Using Department and the offeror.
- (j) A Notice to Proceed, if necessary, is issued by the authorized government official, pursuant to provisions of the contract.

4.1.3 Abbreviated Formal Solicitations

An abbreviated formal solicitation is a method for obtaining competitive sealed bids or competitive sealed proposals by using an abbreviated formal solicitation process.

4.1.3.2 Use

An abbreviated formal solicitation may be used if the Director finds the estimated value of the procurement is \$100,000 or less and the Director finds that the abbreviated formal solicitation process is in the best interest of the County.

4.1.3.3 Procedure

- (a) If the solicitation would normally be accomplished under an IFB, the following changes are made to the IFB process:

- (1) The Office of Procurement issues notice of the IFB to at least 25 potential bidders or all of those on the bidders list, whichever is smaller. If more potential bidders are known than will be solicited, the bidders to be solicited must be randomly selected. At least 20% of the offerors who are sent notice of the IFB should be minority owned businesses. The previous supplier of the goods, services, or construction being acquired should also receive notice of the IFB.
 - (2) The IFB should allow a bidder a minimum of 10 calendar days in which to submit a bid.
- (b) If the procurement would normally be accomplished under an RFP, the following changes are made to the RFP process:
- (1) The Office of Procurement issues notice of the RFP to at least 25 potential offerors or all potential offerors on the bidders list, whichever is smaller. If more potential offerors are identified than will be solicited, those solicited must be randomly selected. At least 20% of the offerors who are sent notice of the RFP should be minority owned businesses. The previous contractor who supplied the goods, services, or construction being purchased should receive notice of the RFP.
 - (2) The RFP should allow an offeror a minimum of 10 calendar days in which to submit a proposal.

4.1.4 Formal Solicitations - Request for Expressions of Interest (REOI)

4.1.4.1 General

An REOI is a formal solicitation for competitive sealed responses containing qualifications and other requested information from prospective sources of the County's requirements. An REOI is initiated to obtain essential procurement information needed to prepare a subsequent solicitation. The purpose of an REOI is to develop a ready source of potential offerors who can respond within a short time frame to the subsequent solicitation. In addition, an REOI may be used to resolve technological or programmatic questions relative to how requirements can best be supplied. Responses to REOIs are not publicly opened and are analyzed in accordance with evaluation criteria set forth in the REOI for the purpose of developing a shortlist of prospective offerors. Evaluation criteria contained in an REOI should be confined to technical considerations and expertise, and should not

ordinarily contain considerations of cost.

4.1.4.2 Use

- (a) REOIs are used where sources of supply are not readily identifiable and there is a need to define both sources of supply and qualified interest in meeting certain County needs.
- (b) REOIs are used when the end result or product has been generally articulated by the County, but the technical approaches or specifications for the product are not sufficiently defined to insure effective competition.
- (c) REOIs are used when there are continuing procurement needs in certain technical areas and readily available qualified sources of supply are necessary to meet timely government requirements. Once the sources of supply are identified, they may be the exclusive sources to which expedited solicitations are directed.

4.1.4.3 Contents

An REOI should include the following information:

- (a) A dated solicitation transmittal letter for signature by the Director that summarizes the central REOI requirements. This letter should be in a form and contain such information as required by the Director.
- (b) A notice of the date, time and place for submission of responses and a statement of the number of copies required to be submitted.
- (c) The date, time and place where a pre-response conference, if any, is to be held.
- (d) The identity, address, and telephone number of a contact person within the Using Department for technical information pertaining to the procurement. The identity and telephone number of a contact person within the Office of Procurement for administrative information relating to the procurement.
- (e) A brief description of the project or system desired and a statement of parameters within which the services are to be rendered. Such description should contain sufficient detail to constitute meaningful notice to potential suppliers and to facilitate responses.

- (f) A concise explanation of the method of shortlisting and ranking, which must include identification of all evaluation criteria and relative weights for each criterion. Evaluation criteria may include those criteria used to evaluate proposals in response to an RFP.

Evaluation criteria for REOIs should not normally include cost factors. If oral interviews are contemplated, the objective criteria for when, how, and which respondents are eligible must be specified. An explanation of point scoring must also be included (e.g. the relationship between written submissions and oral interview evaluations).

The REOI may contain a minimum score which establishes a threshold that an offeror must achieve in order to be considered for inclusion on the shortlist.

- (g) A statement of the maximum number of respondents to be included in the shortlist or objective criteria by which a cut-off is established.
- (h) The REOI should also specify the method by which subsequent contract awards are to be made under the shortlisting which results from the REOI, e.g., IFB or RFP.
- (i) A provision which requires acknowledgement of all amendments or addenda by respondents.
- (j) A statement of the term during which the shortlist is effective and subject to subsequent solicitations or identification of a specific subsequent solicitation to which the shortlist is applicable.
- (k) On a separate form or at the beginning or end of the REOI, all REOI's must provide a specific place for signature by the person authorized to bind the responding firm to their expression of interest, including all representations made and information furnished in response to the REOI. This page must be appropriately identified as being integrated with the entire REOI package.

4.1.4.4 **Procedure**

A procurement pursuant to an REOI is accomplished by the subsequent issuance of one or more solicitations, as stated in the REOI document. The REOI solicitation is accomplished by the following steps:

- (a) REOIs are issued and public notice given under the direction of the Director.
- (b) Timely responses to the REOI are received by the Director and forwarded to the Using Department for evaluation, without public opening.
- (c) The QSC evaluates the proposals received from the Director, in accordance with the evaluation criteria, reviews offerors for responsibility, and forwards its recommendations to the Using Department Head. The QSC evaluation process and QSC certification which applies to an RFP also applies to evaluation of an REOI proposal.
- (d) In the case of a numerical score tie for the last cut-off position (e.g. a tie at 5th place when top five are shortlisted), all firms tied at that position are added to the shortlist.
- (e) After Director approval, the names of the proposed shortlisted firms are placed on a public list by the Director.
- (f) For purposes of subsequent solicitations, there is no ranking within the shortlist, and all firms contained on the shortlist are to be considered of equal merit.
- (g) When appropriate and pursuant to the terms of the REOI, the Using Department initiates one or more solicitations for distribution to the entire shortlist developed by the REOI. Each solicitation must meet all requirements of this Regulation, including MFD requirements as appropriate.

4.1.5 Competitive Negotiation

4.1.5.1 General

Competitive Negotiation is a negotiation process that is authorized pursuant to Chapter 11B, Montgomery County Code. It is a method of procurement which may take place only after an IFB or RFP has failed to produce acceptable bids or proposals and only after a determination and finding by the Director that further competitive bidding would be impractical and not in the best interest of the County. It is an attempt to negotiate a contract to meet, as nearly as possible, County requirements.

4.1.5.2 Use

Competitive negotiation is used when the Director determines at least one of the following exists after the required solicitation:

- (a) No bids or proposals are received by the time and date specified in the solicitation;
- (b) Only one bid is received;
- (c) The Director has determined that none of the bids or proposals received are acceptable;
- (d) None of the bids or proposals received meets County price or budget limitations, including fairness and reasonableness of price; or
- (e) The Director has determined that none of the offerors are responsible.

4.1.5.3 **Procedure**

- (a) Prior to the commencement of negotiations, the Director must notify by public listing all those interested in the procurement of the County's intent to negotiate a contract under this section.
- (b) Competitive negotiations may be accomplished as follows:
 - (1) Where no timely bids or proposals are received or only one timely bid is received, negotiations may take place concurrently with all those solicited who indicate a desire to participate in the negotiations, after notice by public posting and other informal communications inviting participation deemed appropriate by the Director;
 - (2) Where bids or proposals are received, negotiations may be held with the bidder or proposer who most nearly complies with the County's requirements (including price) to attempt to reach and negotiate an acceptable offer. If negotiations fail with the most qualified bidder or proposer, negotiations may proceed to the next most qualified bidder or proposer, upon authorization from the Director.

4.1.6 **Open solicitation**

4.1.6.1 **General**

An open solicitation is a process by which the County accepts applications for a contract on a continuing basis and awards a contract to each applicant who meets pre-established minimum qualifications subject to the available funds.

4.1.6.2 Use

An open solicitation is used when the County desires to award a contract to all persons who meet certain minimum pre-established qualifications. Examples of when an open solicitation might be used are:

- (a) Obtaining instructors for teaching classes to the general public under programs sponsored by a Using Department;
- (b) Obtaining participants in a grant program sponsored by a Using Department; and
- (c) Providing goods or services to clients identified by a Using Department.

4.1.6.3 Procedure

- (a) The Using Department submits to the CRC for approval a plan which:
 - (1) Provides for periodic public notice inviting potential contractors to apply for a contract;
 - (2) Establishes an application process for a potential contractor to follow in order to obtain a contract under the open solicitation;
 - (3) Establishes the criteria under which an application for a contract will be accepted or rejected;
 - (4) Uses a pre-approved form contract which each successful contractor will be required to execute; and
 - (5) Ensures that the cost of all contracts entered into under the plan will not exceed available appropriated funds.
- (b) The Director, or if authorized by the Director the Using Department Head, may award a contract to a person who meets the pre-established minimum qualifications under the open solicitation if the

solicitation and contract are consistent with the plan approved by the CRC.

4.1.7 Informal Solicitation -- Mini-Contract

4.1.7.1 General

A mini-contract is a contract for professional and, under special circumstances, non-professional services valued above \$5,000 and under \$25,000 which is the result of an informal solicitation process. This process does not require any type of public notice; however, informal competition is maintained in order to obtain the lowest responsible offeror. The solicitation process usually requires, at a minimum, documented oral or written contact with at least five prospective offerors, documentation of MFD efforts, and documentation of the results of that contact. A mini-contract is not subject to renewal nor amendment which would increase its value beyond the maximum limit.

4.1.7.2 Use

- (a) A professional services mini-contract is used when the procurement of professional services (including all amendments, modifications, or extensions) is valued above \$5,000 and less than \$25,000. This contract procedure may not be used when the total expenditure for the project or services to be procured may equal or exceed \$25,000; Using Departments may not divide contracts (splitting) for the purpose of avoiding the \$25,000 limit.
- (b) A mini-contract may be used for non-professional services valued above \$5,000 and less than \$25,000 if the Director determines that the use of evaluation criteria other than price would promote the best interests of the County.

4.1.7.3 Contents

A mini-contract should include the following:

- (a) Mandatory clauses.
- (b) An identification of the contractor and a signature which binds the contractor to the contract.
- (c) A clear and concise statement of the scope of services to be performed under the contract.

- (d) A statement of the term of the contract or dates for initiating and completing performance or both.
- (e) A statement of compensation to be received under the contract, including all payment provisions.
- (f) Such additional information with respect to contract performance as is required for the particular contract.
- (g) Where there is a written proposal received from the successful offeror, the Using Department may utilize a form letter which references the proposal and incorporates the applicable mandatory clauses. This form letter must be in a form approved by the Office of County Attorney.

4.1.7.4 **Procedure**

- (a) The Using Department must attempt to contact each potential offeror identified by the Director. The Director must provide the Using Department with the names of 5 potential offerors selected from the bidder's list or all potential offerors on the bidder's list, whichever is smaller. One of the potential offerors selected by the Director should be a minority owned business. The potential offerors should be randomly selected except that, if applicable, one of the potential offerors identified by the Director should be the previous supplier of the services being acquired. The Using Department may also contact additional potential offerors identified by the Using Department. The Using Department must document fully the contact including recording the name of the firm contacted, the name of the person and position within the firm contacted, and the response received. The contact may consist of oral or written communication. With respect to each offer received, the Using Department must document: (1) whether the offeror indicated a willingness and ability to meet the scope of services in a timely manner; (2) the price quoted for the services to be rendered; and (3) other information pertinent to the procurement decision.
- (b) The Using Department makes a determination concerning the most advantageous awardee considering price and other pertinent factors. The Using Department must document the basis of the selection and negotiate a contract with the preferred offeror.

- (c) The Using Department forwards the executed contract to the Director with all required documentation, including a forwarding memorandum signed by the Using Department Head that affirms that: (1) the competitive requirements of this type of procurement have been met; (2) affirms the price is fair and reasonable for the services to be rendered including the original Using Department estimate and an explanation of any deviations from the estimate; (3) states all attempts to procure MFD contracting including the MFD status of the successful awardee; and (4) certifies that the selection, based on price and other considerations, was in the best interest of the County. A purchase requisition document must accompany the executed contract.
- (d) The Director receives the contract from the Using Department, ensures the encumbrance of required funds as appropriate, reviews the contract for compliance with the requirements of these regulations, and executes the contract on behalf of the County. The Director may refer any contract to the Office of the County Attorney for review. The Director distributes copies of the contract to the Using Department and the offeror.

4.1.8 Informal Solicitation -- Small Purchases

4.1.8.1 General

A small purchase is an informal solicitation for goods, construction or services valued above \$5,000 but less than \$25,000. The small purchase is a solicitation initiated by the Using Department and handled solely by the Director who is responsible for ensuring appropriate informal competition and appropriate documentation. This procurement method should preserve competition on an informal basis and an award must be based on price, responsiveness, and responsibility. The Director must contact at least 5 potential offerors selected from the bidder's list or all potential offerors from the bidder's list whichever is smaller. At least one of the potential offerors to be selected should be a minority owned business. The potential offerors should be randomly selected except that, if applicable, the Director should include among those contacted the previous supplier of the goods, construction or services being acquired.

4.1.8.2 Contents

A small purchase consists of a purchase order document with the successful offeror in a form approved by the Office of County Attorney. The purchase order document should contain, at a minimum, a clear statement of

specifications to be met, delivery schedules and other performance requirements, a statement of compensation to be received by the bidder with payment provisions, and signatures by the offeror and the Director. The purchase order document must also contain mandatory clauses as required by the Office of County Attorney. In the case of telephonic communications authorized by the Director, a signature from the offeror is not required. When a written proposal is received, a signature on the written submission from the offeror is sufficient.

4.1.9 Direct Purchases

4.1.9.1 General

A direct purchase is an informal procurement of construction, goods or services with a total value of no more than \$5,000. Competition should be preserved with this method to the extent practicable. Procurements with MFD firms is encouraged. Subject to revision by the CAO, the direct purchase is handled pursuant to the direct authority of a Using Department Head who is solely responsible for making a proper purchase under these procedures. The Using Department Head must seek fair and reasonable prices for all construction, goods and services obtained under this method.

4.1.9.2 Use

Direct purchases are used to secure goods, construction, or services, when the value of the purchase is not greater than \$5,000. Direct purchase procedures may not be used when the construction, goods and services to be obtained are covered by any existing requirements contract with the County, unless expressly authorized by the Director. The Using Department should consult with the Director to ascertain the existence of relevant alternative sources. Purchases which in the aggregate would exceed the limit on this type of procurement may not be subdivided or split to procure within the direct purchase limitations. When the need for a particular product or service occurs within a reasonable time frame and can be consolidated, the purchase must be consolidated and not subdivided.

4.1.9.3 Contents

- (a) A direct purchase consists of
 - (1) a Request for Payment directed to the Department of Finance, Division of Accounts; and
 - (2) an invoice or receipt from the vendor.

- (b) The Request for Payment form must, at a minimum, contain the name and address of the offeror to be paid, signature of the Using Department Head and a description of the construction, goods or services procured and the appropriate account code.
- (c) By signing the Request for Payment, the Using Department Head certifies:
 - (1) The purchase is necessary.
 - (2) Funds for the purchase have been appropriated and are available.
 - (3) The purchase is not covered by any existing requirements contract with Montgomery County, unless authorized by the Director.
 - (4) The purchase is of a complete and distinct item or service, not related to another or easily combined with another, and the purchase is not of a continuing, repetitious, or periodic nature (large orders may not be subdivided to avoid limits of this procedure). For purposes of this affirmation, substantially similar items are considered to be equal.
 - (5) The price is fair and reasonable.

4.1.10 Petty Cash

4.1.10.1 General

A petty cash purchase is an informal purchase of goods or services by an employee which is authorized by the Using Department Head and for which the employee is reimbursed by a petty cash voucher executed by an authorized Using Department representative. This method of procurement may not be utilized when the total value of the goods or services exceeds \$100.

4.1.10.2 Use

Petty cash purchases are used when the goods and services are valued at \$100 or less and there is a Using Department authorization for the expenditure and reimbursement. This purchase may be authorized by the

Using Department and utilized when immediacy or administrative convenience is a paramount need of the Using Department.

4.1.10.3 Contents

A petty cash purchase consists of:

- (a) a receipt for the goods and services purchased; and
- (b) a properly completed and executed petty cash voucher which identifies the expenditure and contains the authorizing signature of an authorized government official.

4.1.11 Emergency Procurements

4.1.11.1 General

An emergency procurement is an informal procurement of goods, construction, or services required as a result of an emergency. An emergency procurement may be authorized by the Director if the Director is available to authorize the procurement, or by the Using Department Head if the Director is unavailable. The emergency procurement requires documentation of the facts which constitute the emergency. Procurements under this section are limited to those goods, construction, or services required to meet the emergency.

4.1.11.2 Use

An emergency procurement is used when there exists facts, properly documented, which constitute an emergency.

4.1.11.3 Contents

- (a) If the Director authorizes an emergency procurement, the Using Department Head must send the Director a memorandum within 5 days after receipt of oral or written authorization to undertake an emergency procurement. The memorandum must include a complete description of the facts and circumstances of the emergency and a description of the goods or services obtained, including the actual price or a not-to-exceed amount. A copy of the memorandum should be delivered to the CAO as soon as practicable.
- (b) If the Department Head authorizes an emergency procurement, the

Using Department Head must forward within 5 days the memorandum described above to the Director and the CAO. The memorandum must also contain the date of the authorization and name and title of the authorized government official who authorized the emergency procurement.

- (c) Whenever practical, the Using Departments should, in making an emergency procurement, use contract documentation required for a mini-contract or a small purchase. Other types of documentation may be used (e.g. direct purchase) if authorized by the Director. Copies of documents must be furnished to the Director.

4.1.11.4 **Authority**

If the Director is not available, the Using Department Head may authorize an emergency procurement and issue a contract. These persons are authorized to take expeditious action to ensure timely contractor performance to meet the emergency. Contract issuance authority includes authority to sign contract documents that bind the County.

4.1.12 **Non-Competitive Procurements**

4.1.12.1 **General**

A non-competitive procurement is the acquisition by contract of a valid County requirement without prior public notice and without competition.

4.1.12.2 **Authority**

The Director may make a non-competitive award unless the non-competitive award is based on a sole source justification and the estimated value of the award is above \$25,000. If the estimated value of the non-competitive award based on a sole source justification exceeds the threshold for an IFB or RFP, the CRC may make a non-competitive award after reviewing a recommendation from the Director. A non-competitive award must be based on a determination and finding.

4.1.12.3 **Use**

A non-competitive procurement may be made if the non-competitive award serves a public purpose and one or more of the following factors exist:

- (a) There is only one source for the required goods, service, or construction which can meet the minimum valid needs of the County. The basis for identifying a sole source includes:
 - (1) Proprietary, patented, or copyrighted items or information are available from only one source;
 - (2) The valid performance or delivery due dates required by the County can be met by only one source;
 - (3) The required compatibility of equipment, accessories, software, or replacement parts can be met by only one source;
 - (4) The County requires for trial use or testing an item or service available from only one source;
 - (5) Required public utility services are available from only one source; or
 - (6) A continuous series of procurements from a single source over a period of time is advantageous as demonstrated by a cost benefit analysis demonstrating that considerations of training, replacement parts, and compatibility with existing capital investments justify the use of a sole source.
- (b) The County requires goods or services for potential or pending litigation, condemnation, or collective bargaining.
- (c) A contractor or subcontractor has been specifically identified in a grant accepted by the County.
- (d) A proposed contractor has been identified in a grant resolution approved by the Council.

4.1.12.4 **Contents**

A non-competitive procurement must contain, at a minimum, the following documentation:

- (a) A contract which includes specifications reflecting the minimum valid needs of the County. The specifications must be narrowly drawn so as not to exceed the reason which justifies the non-competitive award.

- (b) A memorandum from the Using Department Head to the Director which contains a full explanation and justification for the non-competitive procurement.

4.1.13 **Standardized Procurements**

4.1.13.1 **General**

A standardized procurement is a purchase of goods that the CAO determines to be equipment for which standardization and interchangeability of parts is necessary or is otherwise in the public interest. A standardized procurement should include competition when reasonably available. Standardization approval must be for a stated period which bears a reasonable relationship to the life of the equipment and the specialized training or specialized equipment necessary to service and maintain the standardized item. A standardization decision includes a decision to procure compatible parts, equipment, services and training.

4.1.13.2 **Use**

Standardization may be used when:

- (a) Goods will be purchased repetitively over a period of time which will require or affect compatibility purchases over an extended period of time.
- (b) Standardization will appreciably reduce the variety and quantity of parts that must be carried in stock in order to properly maintain the equipment.
- (c) Standardization will produce demonstratable savings in training personnel or in acquiring technical literature and enhance the expertise of personnel in the use or maintenance of the standardized equipment.
- (d) The compatibility of the standardized equipment will permit joint or coordinated operational use by and between diverse departments, agencies, or jurisdictions.
- (e) Existing equipment, systems or inventories are compatible only with the standardized equipment, parts or services to be procured.
- (f) A continuous series of procurements of standardized equipment or parts over a period of time is advantageous, as demonstrated by cost-benefit analysis or similar analysis, because of considerations of

training, replacement parts, compatibility with existing capital investments, and other standardization cost benefits.

4.1.14 Public Entity Procurements

4.1.14.1 General

A public entity procurement is an agreement to acquire or use any goods, services, or construction with a public entity upon terms and conditions considered to be in the best interest of the County as determined by the Director. A public entity procurement does not require public solicitation, nor does it require justification as a non-competitive procurement.

4.1.14.2 Use

A public entity procurement is used when it is in the best interest of the County to obtain goods, services, or construction from those available within the public sector. Among the factors to be considered in determining whether a public entity procurement is in the best interest of the County is the cost effectiveness of the proposed procurement.

4.1.14.3 Authority

Public entity procurements are prepared by the Using Department and issued by the Director.

4.1.15 Bridge Contracts

The Director may, without competition, enter into a bridge contract with another entity if the Director determines that:

- The entity has an existing contract with another public entity for the goods, services, or construction which the County would like to procure;
- A bridge contract is in the best interest of the County; and
- the contract between the entity and the other public entity was awarded as a result of adequate competition.

The bridge contract must provide the County with materially the same goods, services, or construction being provided the other public entity at the same prices being charged the other public entity.

4.1.16 Credit and Debit Card Procurements

Credit and debit cards may be utilized as authorized by the CAO. The authorization of the CAO must designate the following:

- The person(s) authorized to utilize the credit card;
- The monetary limits for any single and class of expenditures under the credit card;
- An itemization or description of all allowable purchases;
- A statement of all limitations with respect to use of the card;
- A statement of any limitations with respect to date of usage of the card or duration of authorization.

4.2 Contract Types

4.2.1 Fixed Price

4.2.1.1 A fixed price contract is a contract which defines the goods, construction, or services to be delivered in exchange for a fixed and defined price. All costs involved have been firmly established, in writing, but may be subject to certain adjustments, objectively defined. Such adjustments may include escalator clauses, incentive clauses, and other adjustment mechanisms. Construction contracts are generally fixed price contracts.

4.2.1.2 A fixed price contract is the preferred contract method in the County. Justification must be furnished for deviations utilizing any other type of contract. The justification must be approved by the Director before any other type of contract can be utilized.

4.2.2 Cost Reimbursement Contracts

4.2.2.1 Cost reimbursement contracts are contracts which provide for reimbursement of a contractor's costs associated with performance of specified contract requirements, as authorized by the contract administrator. These costs may include hourly rates associated with personnel, overhead, out-of-pocket costs, and other costs specified in the contract. For purposes of these regulations, a time and material contract is considered a cost reimbursement contract.

- 4.2.2.2 A contract providing for reimbursement of costs plus percentage of costs is prohibited. Contracts providing for reimbursement of costs plus a fixed fee or incentive fee may be utilized.

4.2.3 Term Contracts

4.2.3.1 Requirements Contracts.

- (a) A requirements contract is an indefinite quantity contract for goods, construction, or services to be furnished at specific times, or as ordered, that establishes fixed unit prices. During the term of a requirements contract, the County should use best efforts to order all actual requirements of designated Using Departments (or of the entire County) during a specified period of time. Failure to utilize a specific requirements contract for a particular procurement must not be considered a breach of the contractual obligation unless the contract specifically provides that the contractor is the exclusive source for the requirements.
- (b) Requirements contracts are administered by the Director as a fixed price source of supply which may be utilized by Using Departments through a delivery order issued by the Director. When deemed appropriate, the Director may authorize Using Departments to issue orders directly to the contractors involved. A delivery order must be supported by an encumbrance before it is issued.

4.2.3.2 Definite Quantity Contract

A definite quantity contract is a fixed-price contract that provides delivery of a specified quantity of goods, construction, or services either at specified times or when ordered. Quantities ordered under a definite quantity contract are limited to the quantity stated in the contract, unless the contract contains an increased quantity option.

4.2.4 Multiple Award Contracts

A multiple award contract is one in which more than one contractor is awarded a contract for specified goods, construction, or services. Use of this contract type is subject to approval of the Director. It may take one of the following forms:

4.2.4.1 Geographic Distribution Awards

Geographic distribution awards are contract awards made to separate

contractors of goods, construction, or services in separate identifiable geographic areas, when such awards are justified by need for adequate delivery, service, availability, distribution of County contract work, or product compatibility.

4.2.4.2 Multiple Source Contracting

- (a) Primary/secondary contracting is contracting where the primary source is one specified contractor and secondary, tertiary, etc. sources perform as backup contractors. In this type of contract, the primary contractor receives all orders for goods or services. The backup contractor orders for goods, construction, or services. The backup contractor (secondary, tertiary, etc.) receives orders only after the primary contractor either fails to deliver under specified conditions in the contract or a specified quantity limit has been ordered from the primary contractor, as specified in the contracts.

- (b) **Distribution Contracts**

These are multiple award contracts which are made for the purpose of distributing orders for particular services or goods among several contractors. Each of these contracts contains tip points specifying a specific quantity of goods or services after which the next designated contractor receives orders, on a rotating basis.

- (c) **Product Need/Compatibility Multiple Awards**

These awards are made to several vendors to ensure availability of specific and unique products or services to meet the varying needs of Using Departments.

4.2.5 Multi-Year or Term Contracts

Multi-year or term contracts may be authorized by the Director when it is appropriate to obtain uninterrupted services extending over more than one year or contract term, when the performance of services involves high start-up costs, when a continuous source of supply over a multi-year or term period is required, or when a change-over of services involves high phase-in/phase-out costs during a transition period. These multi-year or term contracts take the following forms and may be authorized under the following conditions:

4.2.5.1 Renewal contracts

Renewal contracts are contracts entered into with an original term, usually one year, subject to renewal options of a specified maximum period of time, one year or term at a time. These contracts need to be funded with authorized appropriations, as certified by the Director of Finance, for the original term before execution. Thereafter, each option term must be similarly funded before the option may be exercised.

4.2.5.2 Original long term contracts

Original long term contracts are contracts involving a multi-year or term without need for renewal. A multi-year or term contract may be entered into only if sufficient funds are appropriated, and certified by the Director of Finance, sufficient to defray the amount of the first term of the contract. In addition, these contracts may be entered into only upon the following conditions:

- (a) The Using Department furnishes to the Director sufficient written documentation to demonstrate that the requirements contained in the multi-year or term contract are reasonably firm and are continuing over the term of the contract. In addition, the Using Department must furnish sufficient documentation to the Director to demonstrate that the contract is in the best interest of the County because it encourages effective competition or promotes economies in performance and operation.
- (b) Based upon the documentation submitted, the Director determines that the multi-year or term contract is appropriate after being satisfied that the requirements contained in the contract are reasonably firm and continuing over the term of the contract and that the contract will serve the best interests of the County by its encouragement of effective competition or its promoting economies in contract performance and operation.
- (c) The contract must also include a termination provision which provides that in the event funds for terms subsequent to the first term are not appropriated and available for encumbrance for the subsequent years of the contract, the contract may be terminated by the County without further County liability to the contractor.

4.2.6 Incentive Contracts

4.2.6.1 General.

Each Using Department should consider the use of an incentive contract. An incentive contract is appropriate when the required, goods, services or construction can be acquired at lower costs and, in certain instances, with improved delivery or technical performance, by relating the amount payable under the contract to the contractor's performance. Incentive contracts are designed to obtain specific acquisition objectives by:

- establishing reasonable and attainable targets that are clearly communicated to the contractor; and
- including appropriate incentive arrangements designed to motivate contractor efforts that might not otherwise be emphasized and discourage contractor inefficiency and waste.

An incentive contract, however, should not operate to reward a contractor for performance results when the cost of those results outweighs their value to the County. Any amount paid as an incentive must be reasonably related to the additional costs of enhanced performance by the contractor and to the value of the enhanced performance received by the County.

4.2.6.2 Types of incentive contracts.

- (a) A cost plus incentive contract is a contract which provides for reimbursement to the contractor for allowable costs incurred up to a ceiling amount and establishes a formula by which the contractor is rewarded for performing at less than an estimated target cost or exceeds specified performance standards such as time of delivery of contract performance; the contract may provide that the contractor is subject to reduced compensation or specified damages if it exceeds a target cost or fails to meet specified performance standards such as time of delivery of contract performance.
- (b) A fixed-price incentive contract is a fixed-price contract in which the parties establish at the outset a target for performance and a formula by which the contractor is rewarded for exceeding performance and may be subject to reduced compensation or specified damages if the performance is not met.

5. USING DEPARTMENT RESPONSIBILITIES

5.1 General

Using Departments are responsible for assuring that procurement actions are consistent with the policies of the County. These policies include Public Ethics (see Chapter 19A, Montgomery County Code and Ethics, Section 16 in these regulations) and MFD Contracting (see Section 7 of these regulations).

5.2 Specifications

Using Departments must write specifications in such a manner as to encourage competition and to avoid limitation of competition, balanced with the need to serve the public interest. Particular attention should be given by the Using Department to avoiding the creation of artificial barriers to participation of MFD firms in the procurement process.

5.3 Payment Provisions

Payment provisions should provide for objective criteria or "benchmarks" for payment against certain performance events (e.g. payment after delivery and submittal of invoice; 25% payment after completion of foundation work, etc.) Partial payments may not exceed the reasonable value of the performance which entitles the contractor to that partial payment, unless an advance payment is approved.

5.4 Fiscal Responsibilities

5.4.1 The Using Department is responsible for ensuring that there is a sufficient expenditure authority to cover the entire contract amount, or in the case of a multi-year or term contract, the amount of the first term.

5.4.2 The Using Department is responsible for providing to the Director initiating documents sufficient to enable the Director of Finance to certify to the Director that there is an unencumbered balance in the appropriation sufficient to defray the amount of the contract (or in the case of a multi-year contract, the first term of the contract) at the time of execution of the contract on behalf of the County.

5.4.3 The Using Department is responsible for all payment certifications and coordinations required to obtain prompt payment for the contractor as required by the contract. In connection with these payment certifications, the Using Department is responsible for ascertaining and certifying that the contractor has performed in accordance with the contract requirements and has earned all contract payments certified to the Division of Accounts, Department of Finance. The Using Department is also responsible for inspection of goods and acceptance of goods or

services prior to certification of payment to the Division of Accounts. The Using Department may not certify for payment invoices containing more hours than actually worked, payment provisions different than that contained in the contract, or charges against a contract different from that under which performance was rendered.

- 5.4.4 In contracts providing for release or reduction of retention, the Using Department may not process a certification for payment of the retention unless all conditions for payment are satisfied and the Director has approved the payment, in writing.

6. CONTRACTOR QUALIFICATIONS

6.1 Pre-qualifications

6.1.1 General

In general, the County does not provide for pre-qualification of offerors or providers of services except as enumerated below or otherwise provided in these regulations.

6.1.2 Bidder's List

6.1.2.1 The Director maintains a bidder's list. It is County policy to invite all interested parties to submit a written request to be placed on the bidder's list for their products or services. The written request should include the:

- (a) Prospective offeror's name and address
- (b) Goods or services offered.
- (c) Facilities, financial resources and organization in sufficient detail to demonstrate ability, capacity, and reliability with respect to goods or services.
- (d) A listing of recent and current contracts with the County or other persons or entities, including a brief description of goods and services under the contract, dollar value, and other pertinent information.
- (e) A statement of whether the firm seeks to qualify as an MFD contractor, including all required documentation.

6.1.2.2 The Director should make every effort to notify appropriate prospective offerors on the bidder's list of solicitations which may involve their products or services. The Director should assure wide publication of all solicitations, which includes utilization of the bidder's list and sources provided by the Using Department, to the extent that economies and resources permit the Director to do so. Failure to mail a solicitation to any prospective offeror on the bidder's list does not affect the validity of the publication of the solicitation, nor otherwise affect the solicitation.

6.1.2.3 The fact that a potential offeror is on the bidder's list does not establish

the qualification of that offeror for the offering of any particular goods or services. Furthermore, the fact that the offeror is on the list does not preclude disqualification or rejection for lack of responsibility. The Director is under no obligation to engage in any review of the prospective offeror's qualifications or stated areas of interest; however, the Director may remove a potential offeror from the bidder's list upon determination of lack of responsibility for the area of interest indicated or upon determination of disqualification. Further, the Director may, as appropriate, remove potential offerors from the bidder's list when (A) the offeror has failed to respond to three successive solicitations, (B) the offeror has been on the list for two years without response, or (C) other circumstances exist to indicate that the offeror is not expected to respond to solicitations (e.g. bankruptcy).

- 6.1.2.4 A potential offeror may respond to any solicitation, whether or not that offeror is on the bidder's list. The bidder's list is merely a mechanism for encouraging competition and ensuring wide dissemination of a solicitation document, but may not be construed as an exclusive prerequisite for responding to any solicitation.

6.1.3 Special Types of Pre-Qualifications

6.1.3.1 REOI -- Shortlist

An REOI, which is a solicitation for goods, services or construction, establishes a shortlist for subsequent solicitation by either RFP or IFB and is thus a pre-qualification procedure. A shortlist established by an REOI constitutes the exclusive pool of prospective offerors for future solicitations specified in the REOI. The Director should examine the feasibility of use of REOIs for services or construction rendered to the County, when the services or construction are rendered in sufficient quantities or in sufficient aggregate values to justify the REOI pre-qualification/shortlisting process.

6.1.3.2 RFP

An RFP may provide for a multi-step process, each step constituting a pre-qualification process (e.g. top five rated offerors based on scoring of written evaluations proceed to a final evaluation stage which may include cost competition or oral interviews).

6.2 Responsiveness; Minor Informality or Irregularity; Mistake in Bid

- 6.2.1 Responsiveness is a determination of whether the bid conforms to all material aspects of the IFB. An offer which is determined to be non-responsive is rejected and must not be considered further in connection with the IFB unless specifically authorized under the competitive negotiation process. The determination of whether an offeror is responsive is made by the Director. When appropriate, the Director should solicit technical comments from the Using Department and consult with the Office of the County Attorney.
- 6.2.2 In determining responsiveness, the Director must consider, among other factors, the following:
- 6.2.2.1 Conformance with the terms and specifications of the IFB.
 - 6.2.2.2 The nature and scope of conditions attached to the bid or proposal by the offeror.
 - 6.2.2.3 Whether the deviation or failure to conform pertains to a material part of the solicitation.
 - 6.2.2.4 Any other deviations contained in the bid.
- 6.2.3 The Director may give an offeror an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the County. The decision of the Director with respect to whether a defect is a minor informality or irregularity is made in the sole discretion of the Director and is not subject to review.
- 6.2.4 If the Director knows or has reason to conclude that a mistake has been made, the Director may require a bidder to confirm the contents of a bid. Situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges a mistake, the Director may take the following actions which must be based on a written determination and finding:
- 6.2.4.1 If the mistake and the intended correction are clearly evident on the face of the bid, the bid must be corrected and may not be withdrawn. Examples of mistakes that are clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transposition errors, and arithmetical errors.
 - 6.2.4.2 A bidder may be permitted to withdraw a low bid if:
 - (a) A mistake is clearly evident on the face of the bid but what was

intended is not similarly evident; or

- (b) The bidder submits objective proof that clearly and convincingly demonstrates that a mistake was made.

6.2.4.3 If the Director determines that no mistake was made, the bid may not be withdrawn.

6.2.5 When a Using Department Head is authorized to make a procurement (i.e. direct purchase), the Using Department Head is authorized to make the determination of responsiveness in the place of the Director pursuant to the criteria enumerated above.

6.3 Responsibility

6.3.1 Responsibility is a determination based on characteristics of the offeror as opposed to the characteristics of the offer. The reputation, past performance, business and financial capability and other factors determine the responsibility of an offeror and the capability of the offeror to satisfy government's needs and requirements for a specific contract. The offeror has the burden of demonstrating affirmatively its responsibility in connection with a particular solicitation. The Director must determine whether an offeror is responsible for a particular prospective contract. A debarred potential offeror must automatically be considered non-responsible in connection with any particular solicitation. See Disqualification, below.

6.3.2 The factors which may be considered in connection with a determination of responsibility include:

6.3.2.1 The ability, capacity, organization, facilities, and skill of the offeror to perform the contract or provide the goods or services required;

6.3.2.2 The ability of the offeror to perform the contract or provide the services within the time specified without delay, interruption or interference;

6.3.2.3 The integrity, reputation and experience of the offeror, and its key personnel;

6.3.2.4 The quality of performance of previous contracts or services for the County or other entities. Past unsatisfactory performance, for any reason, is sufficient to justify a finding of non-responsibility;

6.3.2.5 The previous and existing compliance by the offeror with laws and

ordinances relating to the contract or services;

6.3.2.6 The sufficiency of financial resources of the offeror to perform the contract or provide the services;

6.3.2.7 The certification of an appropriate accounting system, if required by the contract type. Advice should be obtained from the Department of Finance as to the accounting system required for the particular solicitation;

6.3.2.8 A bid bond and the offeror's evidence of ability to furnish a performance bond may be considered evidence of responsibility; and

6.3.2.9 Past debarment by the County or other entity.

6.3.3 The Director may deny the award, renewal, novation or assignment of a contract to or for any offeror who is in default of payment of any money due the County.

6.3.4 Solicitations in which Using Departments make recommendations for awards to the Director must include a written recommendation with respect to the responsibility of the potential awardee. The Using Department should specify in detail the factual basis for its recommending a finding of responsibility of the potential awardee. In connection with this recommendation, the Using Department should review its files and the central performance file of the Office of Procurement with respect to the performance of the prospective awardee in previous contracts in the Using Department and the County, investigate performance of the prospective awardee in other contracts with the County and other entities to the extent practical, and ensure that the recommended awardee is not on a current Montgomery County list.

6.3.5 Prospective offerors have the burden to demonstrate affirmatively their responsibility. An offeror may be requested at any time by the Director or the Using Department to provide additional information, references and other documentation and information which relate to the determination of responsibility. Failure to furnish requested information may constitute grounds for a finding of non-responsibility of the prospective offeror.

6.3.6 When a Using Department is authorized to make a procurement (i.e., direct purchase), the Using Department Head is authorized to make the determination of responsibility in the place of the Director pursuant to the criteria enumerated above.

6.4 **Disqualification**

6.4.1 **Debarment**

- 6.4.1.1 Debarment is a disqualification of a potential offeror from participating in the procurement process, including being awarded contracts, during a pre-determined period of time. Debarment determinations are based on deficient past performance of an offeror with respect to a County contract, debarment of the offeror by other public entities, criminal convictions of principals of the offeror, or other serious causes which indicate a lack of integrity or competency of the offeror. For purposes of this section, debarment also applies to sub-contractors when the County retains the authority to approve use of sub-contractors in prime contracts.
- 6.4.1.2 The Director must maintain a list of debarred offerors and corresponding dates of debarment. The list should include reference to reasons for the debarment.
- 6.4.1.3 In determining whether a potential offeror should be debarred, the Director may consider, among other factors, the following:
- (a) The quality of performance of the potential offeror in past county contracts, including review of contract performance documents.
 - (b) Written comments received from the Using Department pertaining to the quality of performance of the potential offeror in accordance with terms and conditions of the contract.
 - (c) Any other document or facts which are relative to the failure, refusal, or neglect of a potential offeror to perform in accordance with the conditions of a contract with the County.
 - (d) False certification, including invoices, submitted to the County by the Contractor in connection with any contract or solicitation, including MFD certification.
 - (e) Correspondence or documents received from other public entities.
- 6.4.1.4 The Director must also determine the length of time the potential offeror must be debarred. This length of time should not be less than the time which would be expected to include one or more solicitations for products or services of the disqualified offeror. The time imposed should be consistent with debarments of other similar potential offerors and must in all cases be sufficient to protect the interests of the County from compromise by offerors who have failed to perform contractual obligations in the past. The debarment time imposed by

the Director is not limited by the debarment time imposed by other public entities.

- 6.4.1.5 After consultation with the County Attorney, the Director may debar a potential offeror including a present contractor. The Director must send a notice of a proposed debarment to the person whom the Director proposes to debar. The notice must inform the person of the right to explain why the Director should not debar the person and that the person may request that a hearing be held.
- 6.4.1.6 A person who receives a notice of proposed debarment must within 10 days after the Director issues the notice of proposed debarment provide reasons why debarment should not be imposed and, if desired, request a hearing.
- 6.4.1.7 The Director reviews any material supplied by the person and may conduct a hearing if appropriate. The Director must make a determination and finding regarding the debarment.
- 6.4.1.8 The Director must send any person who opposes debarment a determination and finding resolving the matter. The decision must state that a debarred person has the right to appeal a debarment, after the decision becomes final, to the Circuit Court for Montgomery County, Maryland, under Title 7 of the Maryland Rules of Procedure governing judicial review of decisions of administrative agencies.
- 6.4.1.9 The Director must send a copy of the decision to the CAO who may approve, revise, or remand the decision. If the CAO takes no action within 5 working days, the decision of the Director becomes final.
- 6.4.1.10 The fact that an offeror is not debarred at the time of a solicitation may not affect any determination of non-responsibility with respect to that solicitation.
- 6.4.1.11 A rejection of an offeror for non-responsibility does not necessarily constitute grounds for debarment. Past debarment, however, may constitute grounds for a determination of non-responsibility.

6.4.2 Suspension

- 6.4.2.1 After consulting with the Using Department and the County Attorney, the Director may suspend a person from consideration for award of

contracts if there is reasonable cause for debarment. The suspension may not exceed 6 months.

- 6.4.2.2 The Director must send a notice of proposed suspension to the person whom the Director proposes to suspend. The notice must inform the person of the right to provide written reasons why the person should not be suspended.
- 6.4.2.3 A person who receives a notice of proposed suspension must provide written reasons opposing the suspension within 10 days after the Director issues the notice of proposed suspension.
- 6.4.2.4 The Director reviews any material supplied by the person. The Director must make a determination and finding regarding the suspension.
- 6.4.2.5 The Director must send any person who opposes suspension a determination and finding resolving the matter. The decision must state that a suspended person has the right to appeal, after the decision becomes final, to the Circuit Court for Montgomery County, Maryland, under Title 7 of the Maryland Rules of Procedure governing judicial review of decisions of administrative agencies.
- 6.4.2.6 The Director must send a copy of the decision to the CAO who may approve, revise, or remand the decision. If the CAO takes no action within 5 working days, the decision of the Director becomes final.

7. MINORITY OWNED BUSINESS CONTRACTING

7.1 Purpose

The purpose of Section 7 is to establish procedures to facilitate the goal of the County Government to remedy the effects of discrimination by awarding a percentage of the dollar value of County contracts, including contract modifications and renewals, over \$5,000 to minority owned businesses (MFD owned business or MFD) as defined in Chapter 11B of the County Code in proportion to the availability of MFD owned businesses to perform work under County contracts.

7.2 Policy

7.2.1 The Director, with the assistance of Using Departments and employees involved in contracting and purchasing, must actively and aggressively recruit certified MFD owned businesses to provide goods, construction, and services, including professional services, for the performance of governmental functions to facilitate the MFD goal of the County. Procurements under \$5,000, grants that are appropriated by the County Council to specific grantees, utilities, intragovernmental procurements, and certain intergovernmental procurements including certain bridge contracts identified by the Director are excluded from the base against which the goal is measured.

7.2.2 Businesses that are certified as a minority business enterprise under State procurement law and certain non-profit entities organized to promote the interests of persons with a disability are eligible to be certified as an MFD business in accordance with this regulation. Certification is subject to the graduation provisions of Section 7.4.4.

7.2.3 This regulation is the County's exclusive procedure for the certification, recertification and decertification of MFD owned businesses.

7.2.4 Using Department Heads should seek the advice and concurrence of the Director in the development of internal operating procedures to implement the provisions of this procedure.

7.3 General

7.3.1 In Section 7 the term Washington, D.C. - Baltimore Consolidated Metropolitan Statistical Area has the same meaning as it has in Chapter 11B. The term MFD group or group of MFD owned businesses has the same definition as socially or economically disadvantaged group in Chapter 11B.

7.3.2 To qualify to participate in the MFD subcontracting program under Section 7.3.3, an MFD owned business must:

- belong to an MFD group for which a goal has been set under Section 7.3.4 in the purchasing category covering the work that is the subject of the subcontract; and
- be certified as an MFD owned business under Section 7.4.

7.3.3 MFD Subcontracting Program.

7.3.3.1 Unless the context indicates otherwise, in Section 7,

(a) contract means a contract identified by Using Departments or the Director as having an estimated dollar value of \$65,000 or more, including renewals; and

(b) contractor means a contractor that:

- is not a certified MFD owned business; or
- if the contractor is a certified MFD owned business, the

7.3.3.2 A contractor must subcontract a minimum percentage (as determined by the Director) of the contract price to certified MFD owned businesses that are eligible to participate in the subcontracting program. To be eligible, a certified MFD owned business must have a goal set under Section 7.3.4 in a purchasing category covering the work to be performed under the subcontract. The Director applies the goals established by the CAO under Section 7.3.4.8(d) for each purchasing category covering a substantial amount of work to be done under the contract to set the minimum percentage of the contract which the contractor must subcontract to certified MFD owned businesses.

7.3.3.3 Each contractor must submit a Subcontractor Performance Plan prior to undertaking performance under the contract, or at such earlier time as required by the Director. An MFD Subcontractor Performance Plan must:

- (a) identify each MFD subcontractor;
- (b) identify the amount the contractor has agreed to pay each MFD

subcontractor;

- (c) provide a copy of the language used in each MFD subcontract which requires the use of binding arbitration with a neutral arbitrator to resolve disputes between the contractor and the MFD subcontractor. The language must describe how the costs of dispute resolution will be apportioned; the apportionment must not, in the judgment of the Director, attempt to penalize an MFD subcontractor for filing an arbitration claim; and
- (d) be made a part of the contract between the contractor and the County. County approval of the Subcontractor Performance Plan must not establish a contractual relationship between the County and the MFD subcontractor.

7.3.3.4 The contract between the contractor and the County must require:

- (a) the contractor to notify the Director of any proposed change to the Subcontractor Performance Plan;
- (b) the contractor to provide in each subcontract with an MFD owned business a provision requiring the use of binding arbitration to resolve disputes between the contractor and the MFD owned business;
- (c) that failure to submit documentation showing compliance with the Subcontracting Performance Plan is grounds for imposing liquidated damages unless failure to comply with the Plan is the result of an arbitration decision in favor of the contractor or a waiver granted by the Director. Liquidated damages under this provision should equal the difference between all amounts the contractor has agreed under its plan to pay MFD subcontractors and all amounts actually paid MFD subcontractors considering any relevant waiver or arbitrator's decision; and
- (d) that failure to show compliance with a Subcontractor Performance Plan must result in finding the contractor nonresponsible for purposes of future procurements with the County during the next 3 years.

7.3.3.5 The Director may waive in whole or in part an MFD subcontracting requirement imposed under Section 7.3.3 if the Director finds that:

- (a) it is unusually difficult or impossible for the contractor to meet a subcontracting requirement because, for example, a qualified MFD owned business is not available for subcontracting or the contractor's good-faith efforts to subcontract with available MFD owned businesses have failed;
- (b) reasonable grounds exist to waive a subcontracting requirement because, for example, the subcontracting requirement would undermine the purpose of a contract for personal services, subcontracting would be inconsistent with requirements for confidentiality, or the contract is awarded under an emergency procurement; or
- (c) the contractor belongs to a class of nonprofit entities for which the Director has determined that it would be impractical to require participation in the MFD Subcontracting Program.

7.3.3.6 The Director has sole discretion to determine the estimated value of a contract and may consider the value of any modifications or renewals.

7.3.4 The MFD subcontracting goal is set as follows:

7.3.4.1 By September 1 of each year the Director must determine for the previous fiscal year the availability of each group of MFD owned businesses with one or more employees. The Director must use the latest available federal economic census data, or other reliable means of measuring availability, to determine the availability of MFD owned businesses in the Washington D.C. - Baltimore Consolidated Metropolitan Statistical Area to perform work under County contracts.

7.3.4.2 Fiscal year means July 1 through June 30.

7.3.4.3 The Director must state the availability for each group of MFD owned businesses as a percentage of all available businesses in the purchasing categories of:

- (a) construction;
- (b) goods;
- (c) professional services; and

(d) other services

7.3.4.4 The Director may set the availability of Disabled owned businesses at 0.75 percent in each purchasing category. Not for profit entities that are certified as MFD owned businesses are included in the Disabled owned business group.

7.3.4.5 The Director must determine the percentage of contract dollars awarded to each group of MFD owned businesses as prime contractors and subcontractors in the purchasing categories of:

- (a) construction;
- (b) goods;
- (c) professional services; and
- (d) other services.

7.3.4.6 The Director must determine the disparity between the dollar value of contracts and subcontracts awarded to each group of MFD owned businesses in each purchasing category identified in Section 7.3.4.5 with the availability of that group in each purchasing category. The Director must use, to the extent practicable, a methodology compatible with the methodology used to determine disparity in the Minority, Female, Disabled Disparity Study dated November 26, 1996.

7.3.4.7 By September 1 of each year the Director must submit to the CAO a report setting forth the determinations made under Sections 7.3.4.3 through 7.3.4.6.

7.3.4.8 After receiving the Director's report, the CAO must set by September 30 of each year MFD subcontracting goals for the period beginning on October 1 and ending on September 30.

- (a) In setting MFD subcontracting goals the CAO must determine if the County has significantly underutilized each group of MFD owned businesses in each purchasing category. The CAO makes this determination by considering the disparity between the availability of each group of MFD owned businesses in each purchasing category with the contract dollars awarded to each group of MFD owned businesses in each purchasing category.
- (b) If the CAO determines that a group of MFD owned businesses in a specific purchasing category has been significantly underutilized, the CAO must set an MFD goal for that group in the applicable purchasing category. The goal must be related

to the availability of the group of MFD owned businesses in the purchasing category.

- (c) If the CAO determines that a group of MFD owned businesses in a specific purchasing category has not been significantly underutilized, the CAO must not set an MFD goal in the applicable purchasing category. The CAO, nevertheless, may set a goal for an MFD group in a purchasing category (even though a finding of significant underutilization has not been found) if, in at least one out of the last 4 years, the CAO had determined the MFD group had been significantly underutilized and during that year a goal had not been set for the MFD group in the applicable purchasing category
- (d) The CAO must set for each purchasing category for which an MFD goal has been set an overall MFD subcontracting goal that contractors must meet under Section 7.3.3. The overall MFD subcontracting goal for each purchasing category must be related to the availability of all groups of MFD owned businesses for which a goal is set in that purchasing category.

7.4 Certification of MFD Owned Businesses

7.4.1 The Director may certify an entity as an MFD owned business if the business is certified as a minority business enterprise under State procurement law except for a not for profit entity organized to promote the interests of physically and mentally disabled individuals. In the case of a not for profit entity, the Director must determine that:

- (a) the not for profit entity is certified as a minority business enterprise under State procurement law; and
- (b) at least 51% of the individuals used by the not for profit entity to perform the work or manufacture the goods contracted for by the County are individuals with a physical or mental disability.

The Director must conduct a review to determine whether a business may be certified as an MFD owned business. This review must include an evaluation of the documentation submitted by the business on an MFD Application form. The Director may also include a site visit to the offices of a not for profit entity. The Director may review any of the following:

7.4.1.1 Certifications issued by the State.

- 7.4.1.2 Employment records, health records, and/or educational records of the employees of a not for profit entity seeking MFD certification.
- 7.4.1.3 Other relevant information concerning the operation of a not for profit entity.
- 7.4.2 A request for certification or recertification as an MFD business may be denied by the Director for any of the following reasons:
 - 7.4.2.1 Failure to demonstrate that the business is a certified minority business enterprise under State procurement law.
 - 7.4.2.2 Failure to provide sufficient and timely information for the Director to make a certification or recertification determination.
 - 7.4.2.3 Refusal to permit an on-site inspection by the Director.
 - 7.4.2.4 Failure to comply with a request by the Director for information or access to records.
 - 7.4.2.5 Graduation of the MFD owned business.
- 7.4.3 Certification as an MFD owned business by the County may be revoked for any one of the following reasons:
 - 7.4.3.1 Fraud, deceit or misrepresentation in obtaining certification.
 - 7.4.3.2 Failure to report in writing to the Director within 30 days of the date of the occurrence of any changes in the status of the certified MFD owned business which are relevant to its certification.
 - 7.4.3.3 Failure to demonstrate at the request of the Director that the entity continues to be an MFD owned business.
- 7.4.4 Certification is subject to the graduation provisions of this Section. The Director must not certify an entity as a MFD owned business for a period of time that exceeds 5 years. The Director, however, may certify a business as an MFD owned business for 8 years if during the first 5 years of certification, the MFD owned business:
 - 7.4.4.1 has not received at least
 - (a) 4 subcontracts awarded under Chapter 11B of the

County Code; and

- (b) the cumulative value of the subcontracts has not exceeded \$120,000.

7.4.4.2 The MFD graduation requirement established under this subsection begins on December 1, 1993, and is only effective prospectively.

7.5 Responsibilities

7.5.1 Director

- 7.5.1.1 The Director is responsible for contacts with businesses to identify, encourage and coordinate participation of MFD owned businesses in the procurement process, including certification. This includes notification to MFD owned businesses of prospective procurement opportunities by telephone or mailings based on the most recent MFD owned business directory, encouragement of MFD owned business participation in procurement, as prime contractors or subcontractors, procurement system education and information for MFD owned businesses, and referrals to resources such as technical consultants, sureties and financing.
- 7.5.1.2 The Director maintains up-to-date mailing lists, and other references of County certified MFD owned businesses for use by Using Departments, contractors, and for public information.
- 7.5.1.3 The Director provides Using Departments with a list of certified MFD owned businesses who have stated an interest in providing services required by the Using Department.
- 7.5.1.4 The Director assists Using Departments, as needed, in developing internal operating procedures to use certified MFD owned businesses in accordance with the provisions of this section.
- 7.5.1.5 The Director cooperates with other governments and governmental agencies in exchanging information regarding certified MFD owned businesses.
- 7.5.1.6 The Director distributes to non-minority prime contractors a current list of certified MFD owned businesses with a requirement that one or more be contacted if the work is being subcontracted.

- 7.5.1.7 The Director should ensure that contract administrators receive appropriate guidance in implementing the provisions of this regulation.

7.5.2 Using Departments

- 7.5.2.1 The Using Departments should request and use the most recent list of certified MFD owned businesses furnished by the Director to encourage certified MFD owned business response to Requests for Proposals and Requests for Expressions of Interest and all other procurements.
- 7.5.2.2 When inviting proposals for services with a dollar value of less than \$65,000, whether by RFP, REOI, Mini-Contract or any other form of procurement, the Using Departments must ensure an effort is made to afford certified MFD owned businesses an opportunity to participate in the award of the contract. Periodically, or at the request of the Director, Using Departments must provide to the Director written documentation including contract documents that indicate the results of efforts to provide an opportunity for certified MFD owned businesses to submit proposals. The Using Departments should also cooperate with the Director in efforts to encourage MFD contractor participation by, among other things, establishing minority business procurement objectives consistent with Chapter 11B of the County Code and by developing and implementing techniques to encourage greater MFD owned business participation.
- 7.5.2.3 The Using Departments must notify the Director when an Invitation For Bid, a Request for Proposal or a Request for Expression of Interest is expected to have a dollar value of \$65,000 or more. Notification should be as early as possible but not later than the Using Department's official request to the Director to commence a procurement action.
- 7.5.2.4 The Using Departments should develop, with the advice and concurrence of the Director, internal operating procedures to implement the provisions of this section.

7.6 Procedures for Certification/Recertification of MFD Businesses

- 7.6.1 The Director, upon request from a business or at the Director's initiative, provides a MFD Application form to the business. To ensure timely recertification, the certified MFD owned businesses should file a MFD Application form at least 60 days prior to expiration of certification.

- 7.6.2 The business returns the MFD Application form to the Director in accordance with the form's instructions.
- 7.6.3 The Director reviews the MFD Application form submitted to determine, in accordance with this procedure, whether the business should be certified or recertified as an MFD owned business. Upon determination of eligibility as a MFD owned business, the Director certifies the business as an MFD owned business.
- 7.6.4 If a business is not certified or recertification is denied, the Director informs the applicant, in writing, of the denial, the reasons for denial and the right to request reconsideration of the decision to the Director within 5 days of the date of the decision. This notice of denial should indicate that the business may request a hearing.
- 7.6.5 The Director reviews the request for reconsideration and may conduct a hearing if appropriate. The Director makes a written determination and finding regarding the reconsideration request. The Director must then send a copy of the decision to the CAO who may approve, revise, or remand the decision. If the CAO takes no action within 5 working days, the decision of the Director becomes final.
- 7.6.6 After the decision becomes final, the Director must inform the business making the reconsideration request, in writing, of the decision and the right to appeal to the Circuit Court for Montgomery County, Maryland, pursuant to Title 7 of the Maryland Rules of Procedure governing judicial review of decisions of administrative agencies.

7.7 Procedures for Decertification

- 7.7.1 The Director, based upon a written determination that there are grounds for concluding that the entity is no longer entitled to be certified as an MFD owned business, makes a proposal to revoke the certification. The entity must be notified, in writing, of this proposed decertification.
- 7.7.2 The entity may submit any written information to the Director within the time limits specified by the Director, which must not be less than 3 working days of receipt of notification of the proposed decertification.
- 7.7.3 The Director must review the proposed decertification and any information submitted by the entity and decide whether to revoke the certification after the expiration of the time specified by the Director for submitting information. The Director must inform the entity of the decision, in writing, and the right to request a reconsideration of the decision within 5 days.

- 7.7.4 The entity must submit to the Director a written reconsideration request regarding the decertification within the 5 day limit or waives all rights of appeal.
- 7.7.5 If there is a reconsideration request, the Director may conduct a hearing, if appropriate, concerning the decertification. The Director makes a written determination and finding regarding the decertification request. The Director must then send a copy of the decision to the CAO who may approve, revise, or remand the decision. If the CAO takes no action within 5 working days, the decision of the Director becomes final.
- 7.7.6 After the decision becomes final, the Director must inform the entity making the reconsideration request, in writing, of the decision and the right to appeal to the Circuit Court for Montgomery County, Maryland, pursuant to Title 7 of the Maryland Rules of Procedure governing judicial review of decisions of administrative agencies.

7.8 Special Solicitation Requirements

- 7.8.1 The Director must include in all formal competitive solicitations (and resulting contracts) with an estimated value of \$65,000 or greater MFD contracting conditions in a form created by the Director and approved by the Office of County Attorney.
- 7.8.2 These conditions must include the following provisions:
- 7.8.2.1 Notice of the Montgomery County MFD contracting policy and associated contracting goals.
 - 7.8.2.2 A requirement that the offeror subcontract with certified MFD owned businesses in a manner consistent with Section 7.3.3, and how the offeror may demonstrate the basis for the Director to grant, in whole or in part, a waiver of the MFD subcontracting goal.
 - 7.8.2.3 Notice of the requirement to comply with the MFD Subcontractor Performance Plan, including binding arbitration to resolve disputes with MFD subcontracts and imposition of liquidated damages for failure to comply with the MFD Subcontractor Performance Plan.
 - 7.8.2.4 A specification of all documentation required to be submitted by the contractor, including information required under Section 7.9 which the Director requires the contractor to submit, and time requirements for those submissions as determined by the Director.
 - 7.8.2.5 Notice of non-eligibility and disqualification for award for failure to

submit required documentation or meet MFD goals, unless waived.

7.8.2.6 Limitations on substitutions or other non-use of designated MFD subcontractors.

7.8.2.7 Notice of enforcement procedures, including penalties and actions which may result from non-compliance.

7.8.2.8 Statement of records requirements for contractors, including types of records required and length of time the records must be maintained.

7.8.3 The Director must review and evaluate procurement procedures and solicitation requirements to determine the effect those procedures and requirements may have on the ability of MFD owned businesses to be competitive. The Director may also take necessary action to remove any artificial barriers to competition found to exist. Those actions may include:

7.8.3.1 Requiring Using Departments to take steps to assist contractors in making timely submissions of subcontracting plans.

7.8.3.2 Considering past compliance with the County minority business procurement program in determining contractor responsibility.

7.8.3.3 Adjusting evaluation criteria or method of award decisions and lowering or eliminating insurance, bonding and experience requirements.

7.8.3.4 Requiring the minority procurement officer to report in writing to the Director those solicitations and contracts which adversely affect MFD participation and those actions by existing contractors which do not comply in good faith with approved MFD subcontractor plans.

7.9 Reporting Requirements

The Director may require each contractor to provide the County with information concerning utilization by the contractor of MFD owned businesses in private and government contracts. The Director may also require each certified MFD owned business to provide the County with information concerning its utilization by non-MFD owned businesses in private and government contracts.

7.10 Monitoring Procedures

7.10.1 The contract administrator in conjunction with the minority procurement officer must monitor all contracts subject to MFD

participation to ensure compliance by prime contractors with the requirements of these regulations. Monitoring may include site visits, audits of contractors' books and records relative to County contracts, the submission of copies of invoices from the minority subcontractor to the prime contractor, submission of Contract Monitoring Reports at scheduled intervals during the life of the contract, and other procedures that the Director may require.

7.10.2

The Director must notify certified MFD owned businesses of their responsibility to report to the minority procurement office in a timely manner any changes in status that affects the entity's eligibility for certification as an MFD owned business. The failure of the MFD owned business to report any relevant change in a timely manner constitutes sufficient grounds for de-certification.

8. CONTRACT PAYMENTS

8.1 General Payment Principles

8.1.1 All contracts must specifically provide for methods and timing of payments to be made to the contractor. These provisions should be as detailed as possible, specifying all conditions which must be met by the contractor in order to submit a request for payment and to determine whether a payment is due.

8.1.2 Except as otherwise authorized by these regulations, all payments may be made only after contractor performance has occurred to justify the payments under the contract (e.g. the contractor has incurred a cost and submitted an invoice for an item for which the contractor is entitled to cost reimbursement; the contractor has performed services for which a fair value has been specified as a part of the contract; the contractor is entitled to a progress payment in accordance with the contract upon determination of that extent of performance; goods have been delivered, inspected and accepted by the Using Department and an invoice has been submitted for payment in accordance with the contract). The performance must be accepted as being in accord with the terms of the contract by the Contract Administrator or designee and the amount of the payment must be in accord with the terms of the contract before a payment may be certified by the Using Department.

8.1.3 Certifying whether payments are due the contractor is the responsibility of the Using Department and must be done as expeditiously as possible. The Using Department may be required to justify any failure to expedite payments upon inquiry by the Director.

8.2 Incentive Payments

Contracts may provide for payment of incentive payments in exchange for enhanced contractor performance beyond contract specifications, terms and conditions. Any amount paid as an incentive payment must be reasonably related to the additional costs of enhanced performance by the contractor and to the value of the enhanced performance received by the County.

8.3 Progress or Partial Payments

The approval and recommendation for payment by a Using Department of an invoice submitted by contractor for progress payments or partial payments pursuant to the terms of a contract constitutes certification that a contractor has performed in accordance with the contract and has earned the payment approved, that the Using Department has performed all inspection necessary, including testing, to insure proper performance, and

the Using Department accepts the contractor's performance as complying with the contract for purposes of earning the contract payment. Certification of approval for a progress or partial payment does not constitute waiver of any rights of the County against the contractor for failure to perform pursuant to any of the terms, conditions, or specifications of the contract.

8.4 Advance Payments

A contract may provide for advance payment if the advance payment is part of a commercially acceptable practice as in the case of equipment and software maintenance, periodical subscriptions, registrations, travel, and insurance premiums. In other cases, the Director of Finance and the Director may approve an advance payment if they determine that unique circumstances exist which indicate that an advance payment is in the best interest of the County.

8.5 Retention

8.5.1 In contracts for which retention is provided (generally construction contracts), Using Departments must insure that all retention amounts provided for in the contract are maintained by the County. Partial reduction or final release of retention must be authorized, in writing, by the Director.

8.5.2 Any changes to levels of retention provided in the contract must be approved by the Director, in writing, before the change in the contract retention may become effective.

8.6 Payment of Interest

If interest is payable by the County under Section 11B-34 of the Code, the amount of the interest is calculated by using the interest rate paid by 5 year U.S. Treasury Bills as of the date interest first begins to accrue under Section 11B-34.

9. BONDS AND INSURANCE

9.1 Bonds

9.1.1 Exemption from Bond Requirements

Bond requirements contained in this regulation are not applicable to public works participation agreements (e.g., stormwater agreements, road participation agreements) and other regulatory non-procurement agreements as designated from time to time by the County Attorney.

9.1.2 Director Review

- 9.1.2.1 The Director must review and approve any solicitation for construction contracts in an amount less than \$50,000.00 which has a bond requirement and all bonds required for non-construction contracts.
- 9.1.2.2 The Director in reviewing bond requirements should consider the impact on competition and costs, particularly impacts on MFD firms. The impacts must be balanced with the needs served by the bond requirements, which include appropriate security for performance and other assurances of responsibility.

9.1.3 Minimum Requirements

- 9.1.3.1 All bonds must meet the following minimum requirements:
 - (a) The surety company issuing the bond must be qualified to do business in the state of Maryland.
 - (b) The attorney-in-fact on the bond document must be properly authorized to bind the surety, which authorization may be documented by a power of attorney submitted with the bond, or the attorney-in-fact must be registered with the Circuit Court for Montgomery County, Maryland.
 - (c) The obligee of the bond must be "Montgomery County, Maryland".
- 9.1.3.2 Under State law, a construction contract that exceeds \$50,000 must require the contractor to provide payment security in an amount equal to at least 50 percent of the total amount payable under the contract and for performance security in an appropriate amount. These requirements are optional for construction contracts under \$50,000.

9.1.4 Substitutions

Substitutions for bonds may be permitted only with permission of the County Attorney or pursuant to guidelines issued by the County Attorney. Substitutions may include letters of credit, cash deposits and other forms of security. Personal sureties are generally not acceptable substitutes for bond requirements.

9.2 Insurance

General insurance requirements for contracts are specified by the Office of the County Attorney in the mandatory clauses. Requests for variances from those requirements must be approved by the Office of the County Attorney, which approval authority may be delegated to the Director. The Division of Risk Management, Department of Finance, must be consulted on all matters pertaining to insurance, particularly insurance amounts.

10. CONTRACT COST AND PRICING PRINCIPLES

10.1 Authority

The Director has authority to require that contract cost and pricing principles be followed by Using Departments. In addition, the Director may require a price analysis by Using Departments, particularly in the certification of fair and reasonable prices as required by these regulations.

10.2 Factors

In the analysis of whether the prices and costs associated with a proposed award or contract modification (including field orders) are fair and reasonable, a Using Department should consider one or more of the following factors:

- 10.2.1 Prior award price for the goods or services being procured.
- 10.2.2 Prices contained in other offers responding to that solicitation.
- 10.2.3 Costs estimated for the procurement prior to the receipt of offers.
- 10.2.4 Commercial market prices and other commercial practices relating to costs.
- 10.2.5 Prices paid by other public entities for similar goods or services.
- 10.2.6 Cost analysis which separates components of the offer and allocates costs among those components.

The Director may issue guidelines to the Using Departments for use in a fair and reasonable price analysis.

10.3 Cost-Plus Contracts

A contract must not provide for compensation to be based on cost plus a percentage of cost of the work performed. A contractor must not be financially rewarded for increased costs that are passed on to the County. A contract, however, may provide for reimbursement based upon a cost plus a fixed fee provision or on a compensation provision which rewards the contractor for efficiency by providing for incentive payments.

10.4 Reimbursements

A contract may provide for reimbursement to a contractor for costs specifically identified in the contract. The contract must provide for a means for ensuring that the costs are fair

and reasonable. These means may include a requirement that the contractor document competition. The County has the right to review and approve costs before authorizing reimbursement.

10.5 Requirements for Certified Cost and Pricing Data

10.5.1 Cost and Pricing Data must be submitted by offerors or contractors, in a form prescribed by the Director, prior to approval of:

10.5.1.1 A competitively negotiated contract valued at more than \$100,000.

10.5.1.2 A non-competitively negotiated contract valued at more than \$50,000.

10.5.1.3 Any contract modification for which the price adjustment is expected to exceed \$50,000 except contract modifications that are fully in accordance with the terms and conditions of the contract.

10.5.1.4 Any other contract or contract modification, as may be required by the CAO or Director.

10.5.2 When Cost and Pricing Data is required:

10.5.2.1 Each contractor or offeror must at the request of the Director submit, in a form required by the Director, a certificate showing cost or pricing data, or both, for proposed work to be done, including work to be done by a subcontractor. The offeror or contractor must submit a certification that, to the best of its knowledge and belief, the Cost and Pricing Data submitted is accurate, complete and current.

10.5.2.2 The contract or contract modification document must state that the price to the County, including profit or fee, may be adjusted by the Director to exclude from the price any sums determined by the Director to be allocable to inaccurate, incomplete or outdated cost or pricing data.

10.5.3 When a prime contractor is authorized to expend appropriated funds through subcontractors in the performance of a County contract, Subsections 10.5.1 and 2 are also applicable to subcontracts and subcontract modifications.

10.5.4 A determination as to the reasonableness of the Cost or Pricing Data must be made by the Director, after receiving a recommendation from the Using Department Head, prior to execution of the contract or contract modification. The contract cost principles and procedures in Part 31 of the Federal Acquisition Regulations may be used as general guidelines when

developing price determinations, if they are not at variance with County laws and regulations.

- 10.5.5 The requirements of section 10.5 are not applicable for a contract or contract modification that is based on:
 - 10.5.5.1 Adequate competition as determined by the Director. Competition is adequate when 2 or more responsible offerors that can satisfy County requirements submit priced offers responsive to expressed requirements;
 - 10.5.5.2 Established catalog or market prices of commercial items sold in substantial quantities to the general public; or
 - 10.5.5.3 Laws or regulations.
- 10.5.6 In exceptional cases or for contracts or contract modifications with public entities, the Director may waive the requirement for Cost or Pricing Data by making a written determination that explains why the waiver is in the best interest of the County.

11. CONTRACT MODIFICATIONS

11.1 General

11.1.1 Authorization

Contract modifications may be initiated by either the contractor, contracting officer or the contract administrator. A contract modification is not effective, and a contractor must not proceed with performance under the modification, until and unless the contract modification is executed by the contracting officer.

11.1.2 Use

11.1.2.1 Under extraordinary circumstances, the Director may approve a contract modification:

- for goods, services, or construction that has already been provided;
- to a contract that has expired; or
- to a contract that has been fully completed.

11.1.2.2 A contract modification may be used to approve an equitable adjustment in the case of a unilateral change order. Subject to Chapter 20 of the County Code, a contract modification may be used to approve the settlement of a potential or pending contract dispute.

11.1.3 Policy for Contract Modifications which Change the Scope of a Contract

Contract modifications may not provide for less than full performance by the contractor as provided in the contract unless the contractor, in exchange, gives full and fair consideration (discount on contract price, additional work, etc.) in exchange for the contract modification. The County must not pay any additional monies under a contract modification for work which was required to be performed under the contract.

11.1.4 Review

11.1.4.1 The Director reviews the proposed contract modification, with attachments. If the proposed contract modification exceeds the threshold for an IFB or RFP, the Director must refer the contract modification to the CRC for review unless the Director determines

that the change in compensation results from a mechanical application of an established cost indexing provision or other contract option which pre-determines price. Otherwise, the Director may approve the modification.

- 11.1.4.2 The CRC reviews contract modifications referred by the Director. The CRC may approve, approve with conditions or reject any contract modification.

11.2 Change Orders

- 11.2.1 Change orders may be initiated as provided in the contract. Generally, they are initiated by the contract administrator. The change order may not become effective, and a contractor may not proceed with performance of the change order, until and unless the change order is executed by the contracting officer.
- 11.2.2 Changes which are outside the scope of the contract should not be processed in the form of a change order.
- 11.2.3 The Director reviews the proposed change order, with attachments. If the proposed change order exceeds the threshold for an IFB or RFP, the Director must refer the change order to the CRC for review. Otherwise, the Director may approve the change order.
- 11.2.4 The CRC reviews change orders referred by the Director. The CRC may approve, approve with conditions, or reject any change orders, in whole or in part.

11.3 Field Orders

- 11.3.1 Field orders are used only under the following limited situations:
 - 11.3.1.1 To direct work when unforeseen and unanticipated conditions arise which require immediate action to mitigate costs or avoid delay claims, and there is insufficient time to process a change order;
 - 11.3.1.2 To order a minor change in the work not involving an adjustment in the contract sum or an extension of the contract time, not inconsistent with the intent of the contract documents;
 - 11.3.1.3 To provide a written interpretation, including drawings, necessary for the proper execution or progress of the work consistent with and

reasonably inferable from the contract documents if the interpretation does not adjust the contract sum or the contract time.

- 11.3.2 A field order may be issued by a person specifically delegated the authority to issue a field order under the contract and who acts as a contracting officer for the purpose of issuing the field order. If the estimated value of the field order exceeds the threshold for an IFB or RFP, the Using Department Head must consent to the field order prior to its issuance. A Using Department Head may not delegate this authority to the authorized government official at the place of performance.

11.3.3 **Prohibited field orders**

Field orders are not permitted if there is sufficient time to process a change order, a contract amendment, or, if appropriate, a new procurement to satisfy the County's needs.

12. CONTRACT TERMINATION

12.1 Termination Methods

A contract may be terminated in three ways:

- 12.1.1 A contract may be terminated for default. If the contractor materially breaches the contract, the County, at its option, may cancel in whole or in part work under the contract. A termination for cause should provide for alternative termination for convenience, in the event termination for cause is later found to be without justification.
- 12.1.2 A contract may be terminated for convenience at the option of the County if the termination is in the best interest of the County. Termination for convenience may entitle the contractor to reimbursement for work accomplished or costs incurred up to the date of termination.
- 12.1.3 In special circumstances a contract may be terminated by mutual consent of the parties without fault or further costs to any of the parties. The County Attorney must approve a contract termination under this subsection.

12.2 Authority to Terminate

The Using Department must document reasons for termination. The Using Department may not terminate a contract; only the contracting officer may terminate a contract. The County Attorney should be consulted prior to termination of any contract.

13. CLAIMS

13.1 Defined

A claim is a demand or request for payment from a person or entity who has furnished at the direction of the County goods or services to the County outside of a contract or contract modification. This may occur when:

- 13.1.1 the County accepts goods delivered or services rendered prior to the full execution of a contract;
- 13.1.2 performance is rendered and accepted under a contract which is not valid because of a failure to certify in a timely manner sufficient funds for the contract;
- 13.1.3 a contract is lost and cannot be located at the time payment is due;
- 13.1.4 the performance by the claimant is outside of the scope of a contract and is performed, in good faith, and accepted without an amendment covering it;
or
- 13.1.5 services are rendered or goods are delivered and accepted after the termination of a contract, but otherwise in conformance with its terms and conditions.

13.2 Policy

Claims are not encouraged and must be avoided, whenever possible, by the Using Departments. However, a claims procedure is necessary to provide for fair compensation to a claimant who has performed in good faith, but who, through an oversight or error of the County or through unanticipated circumstances, is not entitled to compensation pursuant to a contract or contract modification. This procedure is discretionary and does not create any rights to payment to the claimant unless the claim is approved by authorized County officials. This procedure may not be utilized by the Using Departments to circumvent the requirements of these regulations.

13.3 Approval Requirements

In order for a claim to be approved, a Using Department must submit documentation and certifications as follows to the Office of County Attorney:

- 13.3.1 A recitation of all facts surrounding the claim which demonstrate that the claimant was directed by the County to proceed with performance of

services or delivery of goods, including an identification of all employees who directed the claimant and their authority to do so.

- 13.3.2 A recitation of facts demonstrating that the claimant would have been entitled to a contract for the services rendered or the goods delivered under the County procurement law and regulations.
- 13.3.3 A statement of all facts which demonstrate that the claimant proceeded in good faith and in reliance upon the direction of County officials.
- 13.3.4 An analysis of the services rendered or goods delivered, which must include (1) a certification of their fair value and (2) a certification that the claim submitted represents a fair and reasonable price for services rendered or goods delivered, including all facts which support the certification. This analysis of services rendered or goods delivered must include a description of all performance rendered by the claimant and acceptance by the County.
- 13.3.5 An explanation from the Using Department of the reason a contract did not cover this claim and a plan or statement of actions taken to assure that this type of claim does not occur in the future.
- 13.3.6 A statement of any additional facts which indicate that the claimant is entitled to payment of the claim as submitted.
- 13.3.7 Attached to this written submission from the Using Department must be a written invoice from the claimant and other appropriate documentation which documents the performance of the claimant, the amount of the claim, and acceptance by the County.
- 13.3.8 Attached to this written submission must be a proposed contract or contract modification which makes the performance rendered by the claimant subject to all applicable mandatory clauses and releases the County from any further claims for the goods, services, or construction accepted by the County and for which payment is proposed to be made.
- 13.3.9 In accordance with the procedures below, Using Departments must submit the original documentation with attachments to the County Attorney, with a copy (without attached documentation from the claimant) to the CAO.

13.4 Procedures for Approval

- 13.4.1 Using Departments submit the required documentation to the Office of County Attorney for review and action. The action of the County Attorney

with respect to the claim may be to approve the claim (if under \$5,000), approve the claim with concurrence of the CAO, reject the claim, or defer approval until further information is received from the Using Department.

- 13.4.1.1 If the claim is less than \$5,000, the County Attorney may approve the claim in writing and return it to the Using Department which is responsible for processing the claim approval for payment.
- 13.4.1.2 If the County Attorney approves the claim subject to approval of the CAO (which is required for claims in excess of \$5,000 and optional for claims under \$5,000), the County Attorney submits a recommendation for approval to the CAO, in writing, together with documentation received from the Using Department.
- 13.4.1.3 If the claim is rejected by the County Attorney, the reasons for the rejection must be in writing and the documentation is returned to the Using Department with the explanation. No further steps for payment to the claimant may be taken by the Using Department, except re-submission to the Office of County Attorney with such additional information as requested or such other information the Using Department may elect to submit.
- 13.4.1.4 If the claim is deferred for further information, the Office of County Attorney must request the Using Department to furnish the information required and the Using Department must respond with the required information as expeditiously as possible. Upon receipt of the request for information, the Office of County Attorney may take action as described above.
- 13.4.2 Upon receipt of the claim together with the action of the County Attorney, the CAO may approve or reject the claim in writing and return all documentation to the Office of County Attorney. Upon receipt of the copy of the original memorandum (without attachments) from the Using Department, the CAO may take such action as is necessary and appropriate to avoid future claims.
- 13.4.3 The County Attorney returns the original documentation to the Using Department together with written actions of the County Attorney and the CAO. The Using Department is responsible for processing payment of the claim, if approved for payment.
- 13.4.4 The Office of County Attorney or the CAO may reject any claim which is not accompanied by full documentation from the Using Department as required by this section.

13.5 Approval Authority

Notwithstanding any provisions of this Section or these Regulations, the determination of the validity of the claim is made in the sole discretion of the County Attorney and the CAO, as provided in the Montgomery County Code.

14. SOLICITATION PROTESTS; CONTRACT DISPUTES

14.1 Solicitation Protests

14.1.1 Definitions

14.1.1.1 In this section, offeror includes a potential offeror.

14.1.1.2 Standing means that the offeror who is filing the protest or appeal may be eligible for an award of the contract if the protest is sustained (e.g., a fourth ranked offeror does not have standing unless the grounds for a protest, if sustained, would disqualify the top three ranked offerors or would require that the solicitation be reissued).

14.1.2 Protest

Only an offeror who has standing may file a protest.

14.1.2.1 Any offeror who is aggrieved in connection with a formal solicitation and wishes to challenge a decision regarding the formal solicitation must file and deliver a written protest to the Director no later than 10 days after the proposed award (or shortlist) is posted by the Director. Protests should be filed as early in the solicitation process as possible to enable timely correction of irregularities; however, protests must not be filed and accepted after the expiration of the 10 day deadline. Any tardy protests must be dismissed by the Director.

14.1.2.2 Each protest must contain the following information:

- (a) An identification of the solicitation from the County;
- (b) The name, address and telephone number of the offeror protesting;
- (c) A statement supporting the standing of the offeror to file a protest;
- (d) Specification of all grounds for the protest, including:
 - (1) A submission of detailed facts and all relevant documents;
 - (2) A citation to relevant language in the solicitation, regulations, or law relied upon; and
 - (3) All other matters which the offeror contends supports the

protest.

- (e) Factual allegations regarding information not appearing on the face of the solicitation or offer must be supported by affidavit based on personal knowledge.
- (f) If bid or proposal preparation costs are sought, the protestant must provide by affidavit based on personal knowledge evidence supporting the costs claimed.

14.1.2.3 After a protest is filed, the Director may give appropriate notice to other known offerors who may be affected by the protest. Other affected offerors may submit written comments or documents regarding the protest. All offerors are required to keep apprised of the current status of solicitations, proposed awards and protests; an offeror may not rely on notice of a protest from the Director. Notice by the Director is discretionary and need not be given. The burden of staying informed about the filing of a protest and the timely submission of comments by affected offerors is on the offerors.

14.1.2.4 The Director may hold a conference with all interested parties if the Director believes a conference would contribute to a resolution of the protest.

14.1.2.5 The burden of production of all relevant evidence, data and documents and the burden of persuasion to support the protest is on the offeror making the protest.

14.1.2.6 After considering the protest based on the record received, the Director must make a determination and finding regarding the protest. The Director must forward by certified mail the determination and finding to the protesting offeror and other offerors who have participated in the protest.

14.1.3 **Appeal**

14.1.3.1 An offeror may appeal to the CRC a protest decision of the Director which adversely affects the offeror within 10 days after the date the decision is mailed. The offeror must have standing to appeal.

14.1.3.2 The appeal must be in writing and must include a copy of the protest and the decision of the Director. In addition, the appeal must contain all grounds for disagreement with the decision of the Director. The

appealing offeror is confined to the grounds specified for the appeal and may not raise new grounds for the appeal after the initial appeal is filed with the CRC.

14.1.3.3 Upon receipt of the appeal, the CRC (with the Director not participating) must review the appeal.

- (a) If the CRC finds the appeal is without merit (which may include lack of standing or failure to comply with appeal procedures), the CRC must deny the appeal and state in writing the reasons which support the denial. The decision must be forwarded by certified mail to the appealing offeror and other offerors who have participated in the appeal.
- (b) If the CRC finds the appeal may have merit, it must notify the appealing offeror, the proposed awardee, the Director, and the Using Department. The CRC may conduct a hearing. If a hearing officer is designated by the CRC, the hearing officer must conduct the hearing and make recommended findings of fact and conclusions to the CRC. After the hearing (if any) and based on the record, the CRC must make a written decision on the appeal, including findings of fact and conclusions. The decision must be forwarded by certified mail to the parties.
- (c) The final decision of the CRC is subject to appeal to the Circuit Court under the Maryland Rules governing administrative appeals.

14.1.4 **Standard of Review of QSC Recommendations**

- 14.1.4.1 If a protest challenges the conduct or action of the QSC, the Director and the CRC must determine whether the QSC recognized and applied the correct procurement principles. Procurement principles are established in applicable law, regulations, and the solicitation documents. The Director or CRC must reverse or remand a decision of a QSC which is based on faulty procurement principles.
- 14.1.4.2 If the QSC did not err in its determination or interpretation of applicable procurement principles, the Director or the CRC should examine the solicitation record to determine if the QSC's conclusions are supported by such evidence as a reasonable mind might accept as adequate to support the QSC's decision. In following this guideline, the Director or the CRC must recognize that it is within the QSC's province to resolve conflicting evidence and, where inconsistent

inferences can be drawn from the data, it is for the QSC to draw these inferences.

- 14.1.4.3 Finally, the Director or CRC must examine how the QSC applied the applicable procurement principles to the facts as disclosed in the record. Deference must be accorded to the judgment of the QSC. The QSC must be affirmed where a reasoning mind could arrive at the conclusion reached by the QSC consistent with the proper application of controlling procurement principles.

14.1.5 Contract Awards

- 14.1.5.1 Generally, contracts are not awarded until the later of 10 days from the date of posting of the proposed awardee or, in the case of a protest, the final administrative decision has been made by the County.
- 14.1.5.2 The Director may award a contract before the 10 days has elapsed or a final administrative decision made with regard to a protest after making a determination and finding which considers:
- (a) The merits of any protesting offeror's complaint;
 - (b) The need of the government for the procurement which is the subject of the protest;
 - (c) The fluctuations in the market which may impact on costs;
 - (d) The unwillingness of the proposed awardee to extend its offer; or
 - (e) Other factors which impact on the public interest.

14.1.6 Solicitation Protest Hearing Procedures; Powers of Hearing Authority

- 14.1.6.1 Hearings are held at a time and place designated in a written notice to the parties to the appeal. The notice may not provide for a hearing earlier than 3 working days after its mailing or hand delivery (unless otherwise agreed by all parties). The hearing is on the record and must be open to the public, unless otherwise ordered by the hearing authority or as provided by law.
- 14.1.6.2 The hearing authority must arrange for a verbatim recordation of all testimony, upon request by any party at least 48 hours in advance of the hearing. The party requesting the transcript must bear the expense

of the recordation and transcript. The hearing authority must maintain a record of the proceedings which consist of the verbatim transcript (if any), exhibits, and a summary of facts found by the hearing authority after the conclusion of the hearing.

14.1.6.3 No ex-parte communications are permitted; an ex-parte communication must not be considered except as provided in the Montgomery County Public Ethics Law. The decision of the hearing authority must be based on the record.

14.1.6.4 Each party may:

- (a) be represented by counsel;
- (b) present evidence, including testimony and documentary exhibits;
- (c) cross-examine witnesses; and
- (d) argue in support of their respective positions.

14.1.6.5 Subject to the direction of the hearing authority, proceedings are informal. Although the hearing authority has full discretion to proceed in an orderly fashion, the following is the usual order for presentation of the appeal:

- (a) Statement by the Director of the decision being appealed;
- (b) Opening statements (appealing offeror first, proposed awardee second, Director last);
- (c) Presentation of witnesses and documents (appealing offeror first, proposed awardee second, Director last); and
- (d) Closing argument (appealing offeror first, proposed awardee second, Director last).

14.1.6.6 The hearing authority may establish requirements with respect to discovery and other pre-trial submissions and procedures.

14.1.6.7 The hearing authority may admit and give appropriate weight to evidence which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs, including hearsay evidence which appears to be reliable in nature. The

hearing authority must give effect to the rules of privilege recognized by law. The hearing authority may exclude incompetent, unreliable, irrelevant or unduly repetitious evidence, or admit evidence at its own request. The hearing authority may question witnesses on any point.

14.1.6.8 The hearing authority may:

- (a) continue or reschedule a hearing;
- (b) accept stipulations;
- (c) require the swearing of witnesses;
- (d) take official notice of commonly cognizable facts;
- (e) rule on motions;
- (f) call and examine witnesses;
- (g) introduce documents into the record;
- (h) administer oaths and affirmations;
- (i) grant or deny requests for subpoenas and production of documents;
- (j) impose sanctions for failing to provide required discovery;
- (k) keep the record open for receipt of additional evidence or submissions by the parties after the close of the hearing; and
- (l) made any other ruling necessary to promote fairness or efficiency in the hearing process.

14.1.6.9 The burden of proof and persuasion with respect to the appeal is on the appealing offeror.

14.1.6.10 The recommendations of a hearing officer to the CRC must be in writing and based on the record. The recommendation must contain findings of fact and conclusions of law with respect to the appeal. A copy of the recommendations must be forwarded to all parties.

14.1.6.11 The CRC may hear separate appeals from different offerors on the same proposed contract award in the same hearing or in separate hearings.

14.2 Contract Disputes

14.2.1 Definition

In this section claim means a written demand by a contractor that seeks the payment of money, an adjustment of time, an adjustment or interpretation of a contract provision, or other relief arising under or relating to a contract.

14.2.2 General

14.2.2.1 Prior to filing a dispute a contractor must attempt to resolve a claim with the contract administrator. A dispute must be filed with the Director within 30 days of the event giving rise to the claim unless the contract provides otherwise.

14.2.2.2 When first filing a dispute, a contractor must provide to the Director the following:

- (a) An identification of the contract with the County;
- (b) The name, address and telephone number of the contractor;
- (c) A specification of all grounds supporting the contractor's requested relief, including:
 - (1) A submission of detailed facts and all relevant documents;
 - (2) A citation to relevant language in the contract, regulations, or law relied upon;
 - (3) All other matters which the contractor contends supports the claim; and
 - (4) The relief requested.
- (d) The factual allegations contained in the dispute must be supported by affidavit based on personal knowledge.

14.2.2.3 (a) The Director in consultation with the contract administrator and the Using Department Head must decide a claim within 45 days unless the parties agree to extend the time for a decision.

- (b) If a contractor is not able to resolve a claim by agreement, the contractor must file a contract dispute appeal with the CAO within 30 days of the denial of the claim or the elapse of 45 days from the receipt of the claim whichever is earlier.
 - (c) Instead of filing a contract dispute appeal with the CAO, the contractor and the Director may agree to submit the dispute to mediation or binding arbitration.
- 14.2.2.4 The CAO may hold a conference with all interested parties if the CAO believes a conference would contribute to a resolution of the dispute.
- 14.2.2.5 The contractor bears the burden of producing all relevant evidence, data, and documents and carries the burden of persuasion to support the relief requested.
- 14.2.2.6 Pending final resolution of a dispute, the contractor must proceed diligently with contract performance unless the County has terminated the contract.
- 14.2.2.7 The CAO may consolidate a contractor's disputes if the disputes have common questions of law or fact. The time limits in Section 14.2 for the last dispute filed apply to the consolidated dispute.
- 14.2.2.8 The CAO or the Director may order a contractor that is not a party to the appeal or the contract under which the dispute has been filed to become a party to the proceeding if the dispute on appeal may be based, in whole or in part, on the performance of the other contractor.
- 14.2.2.9 Upon receipt of the contract dispute appeal, the CAO must review the dispute de novo.
 - (a) If the CAO finds, based on the record, the appeal is without merit (which may include failure to comply with dispute appeal procedures), the CAO must deny the appeal within 30 days after receiving the appeal. The CAO must state in writing the reasons which support the denial.
 - (b) If the CAO finds, based on the record, the appeal has merit, in whole or in part, the CAO must decide the appeal and order an appropriate remedy within 30 days after receiving the appeal.
 - (c) If the CAO determines that the appeal cannot be decided on the record

before the CAO, the CAO may conduct a hearing. If a hearing officer is designated by the CAO, the hearing officer must conduct the hearing and make recommended findings of fact and conclusions to the CAO. The hearing must be conducted in conformance with the time requirements imposed by Chapter 11B of this Code. After the hearing and based on the record, the CAO must make a written decision on the appeal, including findings of fact and conclusions within 30 days after receiving the hearing officer's report.

- (d) The final decision of the CAO is subject to appeal to the Circuit Court under the Maryland Rules governing administrative appeals.

14.2.2.10 Instead of using the contract dispute appeal process the contractor and the CAO may agree to submit the dispute to mediation or binding arbitration.

14.2.3 **Contract Dispute Pre-Hearing Procedures**

14.2.3.1 **Discovery**

Each party to an appeal in a contract dispute is entitled to obtain the following discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the appeal:

- (a) Any time after a contract dispute appeal has been filed with the CAO, a party may serve another party with a request for production, inspection, and copying of documents or any tangible things. Within 30 calendar days after service, the party served must serve a response stating that inspection and copying will be permitted or stating the basis for any objection.
- (b) (1) At the time of filing a dispute appeal involving \$10,000 or more with the CAO, the appealing contractor must provide to the other parties to the dispute a written notice which contains:
 - (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information regarding facts concerning the dispute;
 - (B) a computation of each category of damages or other specific relief sought; and
 - (C) the name, address, and telephone number of each individual from whom the contractor expects to obtain

expert testimony. The notice must include a copy of any report prepared by the expert or if no report has been prepared the notice must include a written statement which contains:

- (i) a complete statement of each opinion to be expressed;
 - (ii) the basis and reason for each opinion;
 - (iii) the data or other information considered by the expert in forming each opinion;
 - (iv) the qualifications of the expert, including a list of all publications authored by the expert; and
 - (v) a list of each case in which the expert has testified as an expert within the preceding 4 years.
- (2) The other parties must provide the notice required under paragraph (1) to the appealing contractor and any other party:
- (A) within 90 days after being served with the notice required under paragraph (1) if the dispute involves more than \$100,000; or
 - (B) within 60 days after being served with the notice required under paragraph (1) if the dispute involves \$100,000 or less.
- (c) If the value of the dispute exceeds \$250,000, any party may depose another party and their witnesses may be deposed, upon oral examination, before an officer authorized to administer oaths at a place of examination, for the purpose of discovery or for use as evidence. The party desiring to take a deposition must serve a notice of deposition upon oral examination at least 7 calendar days before the date of the deposition. A party must not take more than 5 depositions unless the parties agree otherwise.

14.2.3.2 **Pre-Hearing Report**

Seven days prior to the commencement of the hearing, the contractor and the County must submit to the hearing authority, with a copy to the other parties, a pre-hearing report. Each pre-hearing report must, as to the submitting party's case:

- (a) Explain each claim and defense relied upon by the party;
- (b) List all issues not in dispute, facts stipulated, and facts to which the other party is requesting stipulation;
- (c) List each witness (except for rebuttal witnesses) expected to be called by the party and a summary of the facts to which the witness is expected to testify;
- (d) List each expert witness expected to be called and attach a copy of any report prepared by the expert witness. If no report has been prepared, the party must provide a summary of the opinions to which the expert is expected to testify and the basis for each opinion; and
- (e) List each exhibit expected to be introduced by the party.

14.2.4 Hearing Procedures; Powers of Hearing Authority

- 14.2.4.1 Hearings are held at a time and place designated by the hearing authority in a written notice to the parties to the appeal. The hearing is on the record and must be open to the public, unless otherwise ordered by the hearing authority or as provided by law.
- 14.2.4.2 The hearing authority must arrange for a verbatim recordation of all testimony, upon request by any party at least 48 hours in advance of the hearing. The party requesting the transcript must bear the expense of the recordation and transcript. The hearing authority must maintain a record of the proceedings which consists of the verbatim transcript (if any), exhibits, and a summary of facts found by the hearing authority after the conclusion of the hearing.
- 14.2.4.3 No ex-parte communications are permitted; an ex parte communication must not be considered except as provided in the Montgomery County Public Ethics Law. The decision of the hearing authority must be based on the record.
- 14.2.4.4 Each party may:

- (a) be represented by counsel;
- (b) present evidence, including testimony and documentary exhibits;
- (c) cross-examine witnesses; and
- (d) argue in support of their respective positions.

14.2.4.5 Subject to the direction of the hearing authority, proceedings are informal. Although the hearing authority has full discretion to proceed in an orderly fashion, the following is the usual order for presentation of the appeal:

- (a) Opening statements (appealing contractor first, County last);
- (b) Presentation of witnesses and documents (appealing contractor first, County last); and
- (c) Closing argument (appealing contractor first, County last).

14.2.4.6 The hearing authority may admit and give appropriate weight to evidence which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs, including hearsay evidence which appears to be reliable in nature. The hearing authority must give effect to the rules of privilege recognized by law. The hearing authority may exclude incompetent, unreliable, irrelevant or unduly repetitious evidence, or admit evidence at its own request. The hearing authority may question witnesses on any point.

14.2.4.7 The hearing authority may:

- (a) continue or reschedule a hearing;
- (b) accept stipulations;
- (c) require the swearing of witnesses;
- (d) take official notice of commonly cognizable facts;
- (e) rule on motions;
- (f) call and examine witnesses;
- (g) introduce documents into the record;

- (h) administer oaths and affirmations;
- (i) grant or deny requests for subpoenas and production of documents;
- (j) impose sanctions for failing to provide required discovery;
- (k) keep the record open for receipt of additional evidence or submissions by the parties after the close of the hearing; and
- (l) make any other ruling necessary to promote fairness or efficiency in the hearing process.

14.2.4.8 The burden of proof and persuasion with respect to the appeal is on the appealing contractor.

14.2.4.9 The recommendations of a hearing officer to the CAO must be in writing and based on evidence in the record. The recommendation must contain findings of fact and conclusions with respect to the appeal. A copy of the recommendations must be forwarded to all parties.

14.2.5 **Alternative Dispute Resolution**

14.2.5.1 If an election to mediate the dispute has been made, the parties must enter into a mediation agreement which:

- (a) states how a mutually acceptable mediator will be chosen;
- (b) defines the consequences for failing to resolve the dispute through mediation; and
- (c) provides that the cost of the mediation services will be borne equally by the parties.

14.2.5.2 (a) If an election to submit the dispute to binding arbitration is made, the parties must enter into an agreement which:

- (1) states how a mutually acceptable arbitrator will be selected. The parties may agree to use an arbitration service such as the American Arbitration Association or the Federal Mediation and Conciliation Service. Unless the parties agree otherwise, or the mediation service selected provides for another method of selection, the parties must alternatively strike the proposed

arbitrators until one remains.

(2) provides that the cost of the arbitration services will be borne equally by the parties; and

(3) provides for mutual discovery and hearing procedures.

(b) An arbitrator has no authority to amend, add to, or subtract from applicable State and Montgomery County law, Montgomery County Procurement Regulations, and the terms of the contract under which the dispute arises. The arbitrator must make an award that is consistent with applicable law, regulations, and the terms of the contract.

(c) In arbitration, the contractor bears the burden of producing all relevant evidence, data, and documents and carries the burden of persuasion to support the relief requested.

(d) Pending final resolution of the dispute by arbitration, the contractor must proceed diligently with contractor performance unless the County has terminated the contract.

15. CONTRACT REVIEW COMMITTEE (CRC)

15.1 Purpose

The CRC is established for the purpose of review and evaluation of certain procurement actions, preparation and maintenance of procurement regulations, advising the CAO and Director on matters pertaining to procurement in Montgomery County, and for performing such other responsibilities as contained in these regulations or assigned by the CAO.

15.2 Composition

15.2.1 Voting Members

- 15.2.1.1 County employee (Chair) designated by the CAO.
- 15.2.1.2 Director.
- 15.2.1.3 Director of the Office of Management and Budget or designee.
- 15.2.1.4 Director of the Staff of the County Council or designee, when a County Council procurement action is considered.
- 15.2.1.5 County employee designated by the CAO to act in the place of a CRC member listed above, if that member is disqualified, absent or otherwise unable to participate in any matter before the CRC.

15.2.2 Advisory Members (non-voting)

- 15.2.2.1 The County Attorney or designee, who becomes a voting member in the case of a disqualification or absence of a voting member, 15.2.1.1-3 above, if the CAO has not designated another member as provided above.
- 15.2.2.2 A Using Department representative designated by the **CAO**.

15.3 Authority

- 15.3.1 The CRC derives its authority from these regulations and the CAO.
- 15.3.2 The CRC may request any information from Using Departments that it deems necessary in connection with the exercise of its authority and responsibilities. The Director, acting on behalf of the CRC, may request Using Departments

to furnish certain documentation or take certain actions either for submittal to the CRC for review or in order to implement CRC decisions. Using Departments should respond to requests as expeditiously as possible.

- 15.3.3 The Director is authorized to create and regulate the agenda of the CRC, subject to the direction of the Chair, and may issue guidelines to the Using Departments with respect to required submissions, time deadlines and other matters pertaining to the orderly conduct of the agenda for the CRC. This may include coordination of attendance of Using Department representatives at CRC meetings.
- 15.3.4 The CRC may approve procurement actions with conditions. Such conditions must be met before the procurement may be consummated.
- 15.3.5 The CRC may hold hearings, call witnesses, receive documentation and correspondence and conduct investigations.

15.4 Minutes and Records

- 15.4.1 The Director provides staff for the CRC who is responsible for the preparation of meeting agendas and minutes.
- 15.4.2 The minutes reflect voting and actions on each agenda item. Minutes, after final approval by the CRC, are subject to public disclosure except to the extent that portions may not be subject to disclosure pursuant to the State Public Information Act as determined by the Chair and the County Attorney.
- 15.4.3 The CRC may maintain other records as the Chair and Director determine to be appropriate.

15.5 Duties and Responsibilities

- 15.5.1 The CRC is responsible for administrative review and approval of procurement actions as set forth in these regulations, laws and other policies of the County. These procurement actions include:
 - 15.5.1.1 Approval of sole source procurements valued above the threshold for an IFB or RFP.
 - 15.5.1.2 Approval of an Open Solicitation Plan;
 - 15.5.1.3 Approval of all change orders or amendments to a contract valued above the threshold for an IFB or RFP, unless the Director determines that the change in compensation results from a mechanical application of an established cost indexing provision or other contract option

which pre-determines price.

- 15.5.1.4 Approval of every extension of a contract beyond its original term, except:
 - (a) An extension authorized in the original contract, or
 - (b) A single extension of the original term by 12 months or less.
- 15.5.1.5 Consideration of procurement matters referred to the CRC by the CAO, the County Attorney, the Director or a Using Department Head.
- 15.5.1.6 Consideration of other procurement matters contained in these regulations, including hearing and deciding solicitation appeals.
- 15.5.2 The CRC may undertake special investigations or studies and render reports as directed by the CAO.
- 15.5.3 The CRC should review proposed procurement actions being considered by the CRC to coordinate the action with the budgets, programs, and procurement actions of other Using Departments.

16. ETHICS

All public and private participants in the procurement process are subject to County ethics laws. See Chapters 11B and 19A of the Montgomery County Code and the Regulations for standards of conduct required in contracting. Questions regarding ethical issues should be directed to the Montgomery County Ethics Commission, the Office of the County Attorney, or the Director.

17. GRANTS

17.1 Authority

The contracting officer may enter into a non-competitive contract if the entity was named or designated in a grant or resolution of a public entity or in an appropriation of the County Council.

17.2 Authority of the Director

The Director may determine that the contract serves a public purpose and enter into the contract.

17.3 Other requirements

Contracts entered into under the grant authority contained in Chapter 11B of the Code must meet all requirements specified by the Office of the County Attorney and the Director. These requirements include specifications of required performance of the contractor, identification of payment schedules, and all other parameters of contract performance usually expected in County contracts.

Montgomery County, Maryland

Procurement Regulations

Executive Regulation 15-94AM as amended by Executive Regulation 30-97 dated December 9, 1997 and Executive Regulation 25-99 dated February 8, 2000.

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